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IN THE

# Supreme Court of the United States

STEVEN J. THOROGOOD, on behalf of himself and all others similarly situated,

*Petitioner*,

*v.*

SEARS, ROEBUCK AND CO.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, in deciding to certify the case to proceed as a class action under Fed. R. Civ. P. 23, the courts should follow the Ninth and Tenth Circuit rules, finding predominance satisfied by class members' common reliance on the misrepresented content of the relevant product, rather than the Seventh Circuit's view that common reliance and predominance are precluded by consumers' differing subjective motivations for valuing the relied-on attribute.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The district court's (Lienenweber, H.) November 1, 2007 order granting Plaintiff Steven J. Thorogood's motion for class certification is reprinted in the Appendix ("Pet. App.") at 1a.

The Seventh Circuit's (Coffey J., Flaum J., and Rovner J.) February 1, 2009 order denying Defendant Sears, Roebuck & Co.'s ("Sears") Fed. R. Civ. P. 23(f) petition for permission to appeal the district court's class certification order is reprinted in Pet. App. at 10a.

The Seventh Circuit's (Coffey J., Flaum J., and Rovner J.) February 4, 2008 amended order denying Defendant Sears, Roebuck & Co.'s Fed. R. Civ. P. 23(f) petition for permission to appeal the district court's class certification order is reprinted in Pet. App. at 12a.

The Seventh Circuit's (Coffey, J., Flaum, J., and Rovner, J.) March 4, 2008 order granting both Defendant Sears's petition for rehearing and rehearing en banc and Defendant Sears's Fed. R. Civ. P. 23(f) petition for permission to appeal the district court's class certification order is reprinted in Pet. App. at 14a.

The Seventh Circuit's (Posner, J., joined by Kanne, J., and Evans, J.) October 28, 2008 order reversing Judge Lienenweber's grant of class certification is reprinted in Pet. App. at 16a.

The Seventh Circuit's (Posner, J., joined by Kanne, J., and Evans, J.) December 15, 2008 order denying Plaintiff Thorogood's petition for rehearing, with suggestion for rehearing en banc, is reprinted in Pet. App. at 29a.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order reversing the district court's grant of class certification on October 28, 2008. A timely petition for rehearing, with suggestion for rehearing en banc, was denied on December 15, 2008. Petitioner's timely motion for a 60-day extension of time was granted on March 6, 2009, extending the time to file this Petition to and including May 14, 2009.

## STATUTORY PROVISIONS INVOLVED

This case involves Fed. R. Civ. P. 23(a) and (b):

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> > (1) the class is so numerous that joinder of all members is impracticable;
> >
> > (2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

## STATEMENT OF THE CASE

### A. *Nature of the Case*

This action presents a very straightforward consumer fraud claim in which Sears, a leading nationwide consumer home appliance retailer, uniformly advertised certain Kenmore-brand laundry dryers as having a "Stainless Steel" dryer drum, omitting/misrepresenting the fact that the laundry drums were actually only *partially* stainless steel and *partially* mild steel, which corrodes over time and leaves rust stains on the clothing placed inside the laundry dryer. As shown in the record below, this common misrepresentation was material to consumers' purchase decisions because (1) fully stainless steel laundry drums carry a substantial premium over partially stainless steel dryer drums or fully mild steel dryer drums due to stainless steel's higher material and production costs, and (2) fully stainless steel drummed-dryers protect clothing placed in the laundry dryer unlike dryer drums containing mild steel parts, which, as Sears's head laundry dryer buyer testified, is the primary consideration for consumers.

#### 1. *Laundry Dryers Generally.*

Laundry dryers contain a small motor which turns a drum, tumbling the wet clothes placed inside, and drying the clothing by application of air and heat. Because a laundry dryer's drum is in constant contact with moisture from wet clothing, drums composed of corrodible mild steel may rust over time, leaving rust stains on the clothes placed inside the drum. Stainless

steel's unique characteristic is that it does not rust.[1] Dryers with stainless steel drums are, therefore, preferred to drums containing corrodible mild steel. However, due to the higher raw material cost of stainless steel, stainless steel drums carry a price premium over mild steel or partly-stainless steel drums. (District Court Docket No. ("Dkt. No.") 47, Ex. A at 4 (Sears's Kenmore Laundry Buying Guide stating that inclusion of a

[1] An alloy of at least 12% chromium content, stainless steel uniquely resists corrosion:

> In 1913, English metallurgist Harry Brearly, working on a project to improve rifle barrels, accidentally discovered that adding chromium to low carbon steel gives it stain resistance. In addition to iron, carbon, and chromium, modern stainless steel may also contain other elements, such as nickel, niobium, molybdenum, and titanium. Nickel, molybdenum, niobium, and chromium enhance the corrosion resistance of stainless steel. It is the addition of a minimum of 12% chromium to the steel that makes it resist rust, or stain 'less' than other types of steel. The chromium in the steel combines with oxygen in the atmosphere to form a thin, invisible layer of chrome-containing oxide, called the passive film. The sizes of chromium atoms and their oxides are similar, so they pack neatly together on the surface of the metal, forming a stable layer only a few atoms thick. If the metal is cut or scratched and the passive film is disrupted, more oxide will quickly form and recover the exposed surface, protecting it from oxidative corrosion.

Anne Marie Helmenstine, Ph.D., *Why is Stainless Steel Stainless, About.com:Chemistry*, http://chemistry.about.com/cs/metalsandalloys/a/aa071201a.htm (last updated May 20, 2008).

"stainless steel drum" is a "Step Up Feature" above mild steel or partly-stainless steel drums, and are only available on the "Best" Kenmore laundry dryers); Dkt. No. 73-3 (memo from Electrolux stating that substituting a stainless steel drum front for mild steel drum front "will have a favorable cost impact").)

According to Electrolux, the manufacturer of the Kenmore laundry dryers in question, all the Kenmore dryer models included in the Class contain a drum composed of three parts: (1) a "drum back," (2) a drum "wrapper," and (3) a "drum front." (Dkt. No. 73-2, at 3-5.) While the drum "wrapper" and "drum back" on the dryer models are composed of stainless steel, the "drum front" for all the relevant dryers is composed of mild steel covered in a gray epoxy primer paint. (Dkt. No. 73-3.)

Enameled mild steel was chosen instead of stainless steel for the Kenmore dryers' drum fronts based on the "favorable cost impact" of using mild steel.[2] However, before Electrolux decided to include mild steel in these "stainless steel drums," the Electrolux memorandum stated that the "[m]arketing requirement confirmed [the drum front] to be stainless. This should be determined prior to any additional trial run on this component." (*Id.*) Based on the "favorable cost impact," Sears presumably

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[2] According to an Electrolux memorandum dated May 22, 1996, titled "Notes from tool tryout on Stainless Steel Dryer Drum," which discusses results from a May 16, 1996 test conducted on the dryer drums relevant to this action, the "elimination of stainless in [the drum front] will have a favorable cost impact." (*Id.*)

agreed to the placement of mild steel drum fronts for the Kenmore dryers, but misleadingly chose to market the dryers as having "stainless steel drums."

### 2. *Sears's Uniform Misrepresentation of Its Kenmore Laundry Dryers.*

The unrebutted factual record shows that Sears uniformly and prominently misrepresented the relevant Kenmore dryer models as containing a "stainless steel drum," despite the mild steel drum front, in numerous consumer placements: (i) on the front of every dryer, (ii) in Sears's stores at the point of sale, (iii) in the dryers' Parts and Warranty booklets, and (iv) on Sears's Internet website. (Pet. App. at 4a.)

*(i) On the Front of Every Dryer: "Stainless Steel."* First, as shown in Exhibit B of Plaintiff's class certification memorandum, Sears printed "Stainless Steel" on the front of every Kenmore dryer included in the Class. (Dkt. No. 47, Ex. B at 2.) The photograph of Plaintiff's dryer, attached to Plaintiff's class certification brief as Exhibit B, shows that "Stainless Steel" is printed as large, if not larger, than any other word on the face of the dryer, including larger than the temperature settings printed just above the "Stainless Steel" representation. (*Id.*) Neither Party disputed that all the Kenmore dryers contain this prominent, written misrepresentation on the laundry dryers' consoles.

*(ii) Uniform Point-of-Sale Display Cards.* Second, Sears uniformly misrepresented the dryer drums as stainless steel on display cards at the point of sale next

to the Kenmore dryers. (Pet. App. at 4a.) As Plaintiff testified in his deposition, Sears displayed a "florescent yellow card" next to the Kenmore dryer he purchased, which "definitely" said "stainless steel." (Thorogood Dep. at 43:11-14.) Mr. Thorogood was "absolutely certain" the display card did not advertise the drum as "partially stainless steel." (*Id.* at 43:1-7.) Further, Thorogood's First Set of Discovery Requests to Sears sought to corroborate that the national retailer's in-store displays were uniform. (Dkt. No. 53-5 at 6.) While Sears admitted in its response to these requests "that dryer model 417.81142000 was advertised as having a stainless steel drum," Sears did not produce a single in-store point-of-sale advertisement for any of the Kenmore dryers included in the Class. (*Id.* at 17-18; Pet. App. at 7a ("Sears, at least for this motion, has not countered Thorogood's showing that Sears marketed its dryers on a uniform, standard basis.").)

*(iii) Sears's Parts and Warranty Booklets.* Third, exhibits C, D, and E of Plaintiff's class certification memorandum showed Sears's Parts and Warranty booklets represented every dryer model in the Class as having a "stainless steel drum." (Dkt. No. 47, Ex. C, D, E.) Exhibit C provides the part lists Sears produced through discovery, Exhibit D provides the part lists from Sears's website for the booklets Sears did not produce, and Exhibit E combined these part list representations into a single spreadsheet. (*Id.*) Thus, Parts and Warranty booklets available at the time of sale and on Sears's Internet webpage not only provide additional written misrepresentations provided to the Class, but again confirm that Sears misrepresented every dryer model in the Class as having a "stainless steel drum."

*(iv) Sears's Website Advertising.* Fourth, Exhibit A to Plaintiff's class certification brief presents Sears's Kenmore laundry buying guide website advertisement, not only showing an additional written misrepresentation made to the Class, but also showing that Sears presented the "stainless steel drum" as a "Step Up Feature" over Kenmore dryers with mild steel or partly-stainless steel drums. (Dkt. No. 47, Ex. A at 4.) In the advertisement, Sears presents three grades of Kenmore dryers. (*Id.*) The first grade of Kenmore models, described as "Good," contains no drum parts described as stainless steel. (*Id.*) The next grade of dryer, described as "Better," lists certain "Step Up Features," the first of which is a partly-stainless steel dryer drum. (*Id.* ("Stainless Steel Drum Back with white powder-coated drum").) Finally, the "Best" Kenmore laundry dryers (exclusively showing models included in the Class) list, again as their *first* "Step Up Feature," the inclusion of a *fully* stainless steel drum. (*Id.* ("Stainless Steel Drum and Drum Back.").) The buying guide, therefore, not only shows Sears's uniform misrepresentation of the Kenmore dryers on Sears's website, but also confirms that Sears represented a "stainless steel drum" as being superior to mild steel or partly-stainless steel drums, and shows that Sears only made "stainless steel drums" available on its most premium Kenmore laundry dryers.

*(v) Sears's Rebuttal Evidence.* The only evidence Sears relied upon to rebut all of this evidence is the ambiguously-worded affidavit of Dan Pigatto, a Sears employee. (Dkt. No. 52, Ex. A.) Mr. Pigatto confirmed that "'Stainless Steel' appear[s] on the front console of plaintiff's dryer and the front console [of] other stainless

steel drummed dryers. . ." (*Id.* at 4.) Mr. Pigatto's declaration also confirms the inclusion of a stainless steel drum is a representation that materially affects a consumer's purchase decision, listing numerous benefits stainless steel drums have over mild steel or partly-stainless drums, "in addition to rust-resistance." (*Id.* at 3.)

Thus, Sears presented no evidence rebutting the uniformity of its misrepresentations, no evidence directly challenging that it charged a premium for the "Step Up Feature" of a "stainless steel drum," and inadvertently supported Plaintiff's position that the "stainless steel drum" misrepresentation materially affected a purchaser's buying decision.

### 3. *Sears's Deception of Plaintiff Steven Thorogood.*

Plaintiff Thorogood purchased his Kenmore dryer (model number 417.81142000) on November 23, 2001, in reliance on the two misrepresentations that he viewed at the Sears store in Johnson City, Tennessee. (Dkt. No. 1 at 10.) In addition to Sears stamping "Stainless Steel" on the face of the dryer, Mr. Thorogood also viewed the "florescent yellow" in-store point-of-sale display card representing the dryer as having a "stainless steel drum." (Thorogood Dep. at 42:12-24.) Thorogood saw the Kenmore dryer first, "then toured the store [ ] and looked at some other models." (*Id.* at 39:2-24.) After viewing both "stainless steel drum" representations, other laundry washers and dryers, and having a brief conversation with the Sears sales representative, Mr. Thorogood purchased the Kenmore

washer and dryer, paying approximately $1,100 for the set. (*Id.* at 55:23-56:2.)

Mr. Thorogood discovered Sears's deception when the "Stainless Steel" drummed laundry dryer began leaving brown stains on the clothing he dried in the dryer, beginning in late 2005. (Dkt. No. 1 at 11.) Mr. Thorogood inspected the dryer, determining that the front interior portion of the supposedly stainless steel-drummed dryer had rusted, and was actually an enamel-painted mild steel. (*Id.*) Knowing that stainless steel could not rust, Mr. Thorogood first contacted the dryer's manufacturer, Electrolux, to confirm the correct drum was placed in his machine, and not an inferior drum by mistake. (*Id.*) Mr. Thorogood then contacted Sears's customer service department on December 8, 2005. (*Id.*) After sending three service technicians on two occasions to confirm that the drum had rusted, Sears told Mr. Thorogood that he must purchase a replacement drum, which would also have the mild steel drum front. (Dkt. No. 1 at 11-12.)

Feeling cheated by Sears's blatant misrepresentations, Mr. Thorogood proceeded up the corporate ladder, sending a letter to Sears's CEO, hoping someone might have the foresight to amicably resolve the problem. (Dkt. No. 1 at 26-28.) Thorogood received no response. (Dkt. No. 1 at 12.)

Mr. Thorogood then filed a complaint with the Better Business Bureau. (Dkt. No. 1 at 30-32.) (*Id.* at 41-43.) Sears's response admitted both that "the dryer was represented as having a stainless steel drum," and that the drum exhibited "signs of rust on [the] edge of the

interior drum." (Dkt. No. 1 at 30.) However, Sears argued, as it does here, that its representation that the drum was "stainless steel" did not mean the drum was "100%" or "fully" stainless steel. (*Id.*) Mr. Thorogood aptly responded that "I purchased [the dryer] because it was advertized as having a Stainless Steel Drum. It does not[.] This is CLEARLY a misrepresentation." (*Id.*)

Sears's response was to offer Mr. Thorogood "a 15% discount towards the purchase of a new dryer at Sears," which Mr. Thorogood rejected. (Dkt. No. 1 at 32.) The Better Business Bureau then "judged [the] complaint resolved" on February 28, 2006, closing Mr. Thorogood's case. (*Id.*) Even after the Bureau closed his case, Mr. Thorogood notified Sears, through the Better Business Bureau, that "before I consider further Legal Action – can we go to Mediation on this matter?" (*Id.*) Sears did not respond to this request. (*Id.*)

Thus, Mr. Thorogood made every possible attempt to resolve this matter before resorting to this class action. Sears could have resolved its fraud on an individual basis without litigation, choosing instead to force Mr. Thorogood into filing suit and incurring thousands of dollars in expenses and attorneys' fees in order to seek rightful compensation for Sears's admitted misrepresentation.

Therefore, the record before the District Court shows (1) Sears advertised its Kenmore dryers as "Good," "Better," and "Best," respectively, as having drums composed of either mild steel, partly stainless steel and partly mild steel, or stainless steel –

representing the "stainless steel drums" as available on only the "Best" Kenmore laundry dryers; (2) Sears uniformly advertised each laundry dryer model as having a "stainless steel drum" (i) on the front of the dryers, (ii) at the point of sale at every Sears store, (iii) in all the dryers' Parts and Warranty booklets, and (iv) on Sears's Internet website. As the district court found, and as the evidence discovered to that point showed, these common misrepresentations materially affected consumers' purchase decisions because (1) quality of care is the "*primary*" concern of laundry dryer purchasers, which stainless steel drums delivery over partially stainless steel/partially mild steel drums for a variety of reasons, and (2) fully stainless steel drums carry a price premium over partially stainless steel drums and fully mild steel drums, meaning consumers would not pay this additional amount but for their desire to purchase a fully stainless steel-drummed laundry dryer.

Additionally, Plaintiff limited his Class to those jurisdictions that similarly provide private causes of action for "unfair and deceptive acts" that cause Plaintiff an ascertainable loss, and provided extensive analysis for each jurisdiction to ensure that the same legal standard would govern the entire Class.

### B. *Proceedings and Disposition Below*

#### 1. *The District Court's Grant of Class Certification.*

The district court certified Mr. Thorogood's Class only after the parties' extensive briefing, and only after the district court graciously permitted Sears's repeated and determined efforts to have the last, if not misstated, word in all the filings.

Plaintiff Thorogood filed his complaint on March 9, 2006, in state court, Circuit Court of Cook County, Illinois,[3] Chancery Division, alleging consumer fraud, breach of implied and express warranties, and unjust enrichment. (Dkt. No. 1 at 8-32.) Asserting diversity jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), Sears removed the case to United States District Court for the Northern District of Illinois on April 10, 2006 (Dkt. No. 1 at 8), and moved to dismiss all counts of Plaintiff's complaint on July 12, 2006 (Dkt. No. 19). The District Court denied Sears's motion as to the consumer fraud count (Dkt. No. 29 at 3-7), but dismissed the statutory warranty claims as time-barred (*id.* at 8-9), and dismissed the unjust enrichment claim as not permitted where contract claims are pled (*id.* at 11-12).

In subsequent discovery, Sears produced all the model numbers and units sold for Kenmore dryers containing the same partly-mild steel drum found on Mr. Thorogood's Kenmore dryer. (Dkt. No. 47, Ex. F.)

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[3] Sears's headquarters are located in Cook County.

Sears's list showed that it had sold 852,861 dryers with the same partly-mild steel drums nationwide. (*Id.* at 136.) Plaintiff then examined the "Parts List" for each such listed model in order to determine which Kenmore dryers Sears represented as having a "stainless steel drum." (Dkt. No. 47-2 at 6-7.) Plaintiff also sought all representations concerning the Kenmore dryers that Sears made at the point of sale at Sears's stores, on Sears's Internet webpage, and in its catalogues. (Dkt. No. 53-5 at 9.) While Sears produced its past catalogue advertisements and some Internet advertisements, it did not produce any in-store point-of-sale advertisements. (*Id.* at 10.)

On June 15, 2007, Plaintiff moved to certify a Rule 23(b)(3) class of consumers Sears similarly defrauded, (Dkt. No. 47-1), appending to his motion: (i) exhibits evidencing Sears's uniform misrepresentation of each such Kenmore model as having a "stainless steel drum" (Dkt. No. 47, Ex. B-F), (ii) exhibits showing that Sears sold over 690,000 of the misrepresented laundry dryers (*Id.*, Ex. E, F), (iii) an exhibit showing that Sears represented these stainless steel drums as being superior to dryers Sears represented as having mild steel or partly-stainless steel drums (*Id.*, Ex. A), and (iv) an exhibit showing all consumer fraud statutes prohibiting unfair and deceptive practices based on the Federal Trade Commission Act (*Id.*, Ex. G).

Sears opposed class certification, (Dkt. No. 52-1), arguing that (1) Tennessee's limitation of its consumer protection act to individual cases precluded federal courts from certifying the case to proceed for the Class, (2) individual issues of law and fact predominate,

(3) Plaintiff had not undertaken a "state-by-state analysis of the consumer fraud acts" included in the Class, and (4) the requirements of Rule 23(a) were not met. (*Id.*) Sears's only evidence supporting its opposition were two declarations. (Dkt. No. 52-3.) The first declaration, from Sears's employee Dan Pigatto, essentially disputes consumer motivation and pins the problem on Electrolux Home Products, Inc., the dryers' manufacturer:

- Electrolux is the "exclusive provider" of the Kenmore dryers in question (Dkt. No. 52-2 at ¶ 5);

- Presumably because other laundry dryer features may outweigh the cost of a given dryer represented as having a stainless steel drum, "[t]he inclusion of a stainless steel drum does not mean that a particular dryer will be more expensive than another" (*id.* at ¶ 14);

- "Stainless steel provides many benefits in addition to rust-resistance" and that there are many more advantages to "stainless steel drummed dryers" and many disadvantages to "powder coated or painted" (i.e., mild steel) drums that would materially affect a customer's purchase decision (*id.* at ¶ 12);

- Every laundry dryer included in the Class indeed has "Stainless Steel" printed on the dryer's front panel, which references

> the dryer's drum, but that Sears believes this representation to be "accurate" (Dkt. No. 52-2 at ¶18).

Sears's only other "evidence" opposing class certification, the declaration from an Electrolux employee, Brian Ripley, was withdrawn by Sears after the District Court ordered Sears to produce the witness's relevant files to Plaintiff for the deposition. (Dkt. Nos. 57, 65.) Thus, the only support for Sears's opposition to class certification was its own employee's mere declaration, which actually supported Plaintiff's assertions of the uniformity of Sears's "stainless steel drum" misrepresentations and the materiality of that misrepresentation to laundry dryer purchasers.

Plaintiff's Reply in Support of Class Certification, (Dkt. No. 58-1), countered Sears's argument over whether a single legal standard governed Plaintiff's Class, setting forth the actual elements of each statute included in the Class, and limiting the Class to those twenty-nine jurisdictions with the same essential elements: (1) defendant's unfair or deceptive business practice (2) causing plaintiff (3) an ascertainable loss. (Dkt. No. 58, Ex. A.)

Sears then sur-replied on the statutory analysis, but also added blatantly new arguments responsive to Plaintiff's opening class certification brief. (Dkt. No. 62-1.) On Plaintiff's objection, (Dkt. No. 66), the District Court allowed Sears's sur-reply, but also requested that Plaintiff respond to the sur-reply, (Dkt. No. 68), which Plaintiff did. (Dkt. No. 73.)

On September 13, 2007, Sears filed *yet another* opposition brief (without seeking leave from the District Court), styled as a "Brief in Opposition to Plaintiff Thorogood's Motion for Reconsideration and Second Sur-Sur-Reply Brief" (Dkt. No. 74), in which it *further* argued class certification issues, *yet again* raising entirely new arguments responsive to Plaintiff's original pleading. (*Id.* at 8-10.)

Since responding by brief would have produced yet further Sears filings, Plaintiff brought the matter to a head, requesting oral argument and setting forth the issues disputed by the parties (Dkt. No. 76.) Once again, Sears responded without prior leave, "suggest[ing]" the court rule by mail. (Dkt. No. 77.)

On November 1, 2007, after the parties' exhaustive briefing, the district court granted class certification. It first found numerosity satisfied because "thousands of individuals purchased Sears clothes dryers that were allegedly falsely advertised as having a stainless steel drum." (Pet. App. at 3a.) Commonality was satisfied by Sears's uniform misrepresentations (1) on the front of the dryers, (2) next to the dryers at every Sears store, (3) in the Parts and Warranty booklets, and (4) on Sears's website. (*Id.* at 4a.) Thorogood next satisfied typicality because he purchased the similarly misrepresented Kenmore dryer on November 23, 2001, within the Class Period that began on March 9, 2001. (*Id.* at 6a.) Adequacy was also satisfied for both Thorogood and his counsel because Thorogood was a typical class member with no adverse interests to the Class, and because Thorogood's counsel had diligently presented the case and was experienced in complex class action litigation.

(*Id.* at 6a-7a.) Finally, the District Court found the Rule 23(b)(3) predominance requirement satisfied because (1) the clear uniformity and prominence of Sears's misrepresentations allowed the court to presume that each Class Member saw at least one of the misrepresentations and could logically presume their reliance, according to authority in the Seventh Circuit, and (2) all Class Members' claims could be adjudicated under the same legal standard, as shown in the extensive analysis set forth in Plaintiff's two exhibits devoted exclusively to the substantive consumer fraud legal standards (Dkt. No. 47, Ex. G; Dkt. No. 58, Ex. A), as well as the extensive procedural and substantive statutory analysis set forth in Plaintiff's three briefs supporting class certification. (Substantive statutory analysis: Dkt. Nos. 58-1 at 5-7, 73 at 7-11; Procedural analysis: Dkt. Nos. 58-1 at 3-5, 73 at 11-14.) The District Court also found that class treatment was superior to thousands of individual lawsuits. (Pet. App. at 7a.)

### 2. *The Seventh Circuit Initially Denies Sears's Rule 23(f) Petition for Permissive Appeal.*

After the district court granted Mr. Thorogood's motion for class certification, Sears's petition for 23(f) review, which included the fact-based commonality/reliance issues addressed in the Panel Opinion, was denied on February 1, 2008 by a panel of judges consisting of judges Coffey, Flaum, and Rovner.

On February 15, 2008, Sears petitioned for panel "rehearing" on its Rule 23(f) petition. The panel initially

gave Mr. Thorogood until March 10, 2008 to respond. However, following Sears's February 18, 2008 notice of supplemental authority that the Tennessee Supreme Court, in *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301 (Tenn. Feb. 13, 2008), had declared the Tennessee Consumer Protection Act unavailable for class claims, the panel **abruptly granted** Sears's petition for rehearing and 23(f) petition on March 4, 2008, *without waiting for Thorogood's response.* Surprisingly, the panel hearing the appeal (now composed of judges Posner, Kanne, and Evans) explicitly disavowed any interest in the *Walker* decision during oral argument, instead focusing exclusively on the issues which Sears's 23(f) petition had been rejected: the argument that *consumers differing individualized desires* in purchasing the "stainless steel" drummed dryer defeats predominance of Sears's common misrepresentation. Without any apparent material change in the facts or law arising subsequent to the original panel's rejection of Sears's 23(f) petition, there appears no justification for the original panel to reverse its earlier denial. But, the new panel's reversal, based solely on its own factual findings, did not even give lip service consideration, let alone the abuse of discretion standard, to the court's findings that Sears commonly and materially misrepresented the Kenmore-brand laundry dryers.

### 3. *The Panel's Reversal of the District Court's Order Granting Class Certification.*

The new panel, focusing only on the factual issues previously rejected by both the district court and first panel, reversed the district court's grant of class

certification, declaring "no common issues of law or fact," despite the district court's contrary findings, despite the factual record showing Sears's common and uniform written misrepresentations, and despite the Seventh Circuit never disagreeing that Sears, in fact, uniformly advertised the dryers as having "Stainless Steel" drums, when the drums were actually only partially stainless steel.

Rather than focus on the district court's findings that Sears (1) commonly misrepresented the laundry dryer drums, and (2) the materiality of Sears's misrepresentations, the Seventh Circuit instead focused on the individual motivations that laundry purchasers *could* have, thereby supposedly leading to individual hearings. First, the Panel concluded that Sears's representation that the Kenmore drums were "stainless steel" only implied that the drums were 100% stainless steel, and that Plaintiff had not shown any other advertisements or any other reason why the Class would regard the "stainless steel" representation as meaning the drums were fully stainless steel. (Pet. App. at 24a.) The Panel's Opinion, however, never acknowledged the undisputed facts that Sears never disclosed that its "stainless steel" drum contained mild steel, and that Sears also separately offered and advertised Kenmore dryers with a "partly" stainless steel drum feature. (*See* Dkt. No. 47, Ex. A at 4.)

Second, the Panel contradictorily declared that Sears did not advertise the stainless steel drums as eliminating the problem of rust stains, after acknowledging that Sears **had** represented that

"Stainless Steel Drum resists rust and won't chip, peel or snag clothes." (Pet. App. at 25a.)

Third, the Panel's Opinion concluded that rust stains are not "a common concern of owners of clothes dryers," and concluded that this concern was "certainly . . . not common knowledge." (Pet. App. at 24a.) In making this conclusion, the Panel did not cite to the record, nor did it acknowledge or address the testimony from Sears's own head laundry buyer stating the *exact opposite*, e.g., that stainless steel drums offer superior fabric care in regards to preventing rust stains on clothing, as well as preventing the transfer of clothing dye.[4] Pigatto Decl., ¶¶ 7, 12.

Fourth, the Panel concluded that stainless steel was not functionally useful for dryer drums because "ceramic coating on non-stainless steel is unlikely to rust, chip, peel, or snag on clothes either." (Pet. App. at 25a.) This conclusion also had no basis in the record, and is just plain wrong: Sears has regularly acknowledged that ceramic coatings do eventually chip and peel, resulting

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[4] Supporting this factual finding, the Panel analogized to the preference for stainless steel sinks over mild steel sinks coated with porcelain. (Pet. App. at 24a.) This analogy is flawed because mild steel coated ceramic dryer drum parts are much more of a liability in laundry dryers because dryer drums are in contact with wet *clothing*, as opposed to *dish wear*. If a chipped sink were to leach rust on to a plate, a consumer could simply wash off that rust, unlike clothing. Therefore, while the preference for stainless steel in sinks may be purely aesthetic, that preference in dryer drums has a serious functional concern, as evidenced by Sears's laundry buyer's testimony. Pigatto Decl., ¶¶ 7, 12.

in the mild steel below the surface to rust. Sears has acknowledged the existence of this fact first in its response to Mr. Thorgoood's Better Business Bureau complaint, and made this fact clear in the testimony of Sears's laundry buyer, which comports with the warnings that Sears sets forth to consumers in every one of its warranty booklets.

Fifth, the Panel relied on the purported lack of complaints on "Fight Back.com" as evidence that Mr. Thorogood's concerns and expectations were "idiosyncratic." (Def. App. at 25a.) However, the Panel's reliance was misplaced because if one were to simply type "Kenmore Dryer Rust" into a Google search engine, the *first result* is an "Epinions.com" website showing 69 posts at the time of the opinion complaining of rust stains associated with their Kenmore dryers, dating back to December 2005, well before this suit was initiated.[5] Additionally, after the district court's class certification decision and while the case was stayed pending this appeal, numerous consumers contacted class counsel to complain about this very problem.

Last, the Panel's holding that superiority was lacking rests on its mis-focus on possible consumer motivations for paying a premium for the stainless steel-drummed dryers, rather than the uniform fact that these consumers paid extra for a dryer misrepresented

[5] *http://www.epinions.com/msg/show_~threads/cat_id_~17/id_~5867/forum_id_~409* (last visited on November 11, 2008). Notably, many complaints by consumers posted on this website hope for class action relief because of Sears's failure to correct the problem.

as having that qualitative feature. (Pet. App. at 25a.) The Panel's belief that consumers may be "indifferent" (economically equivalent) to the inclusion of a *fully* stainless steel drum is irrational because, here, consumers paid a premium for this "step up-feature" over dryers explicitly represented as having *partially* stainless steel drums. Thus, regardless of the motivation, consumers would *only* purchase the dryer models in question and pay more for a dryer with a fully stainless steel drum, instead of paying less for the "partly" stainless steel-drummed dryers, if the fully stainless steel drum feature *materially affected their purchase decision.*

Simply put, in reversing the district court's grant of class certification, the Panel Opinion blatantly ignored the record evidence that all class members received the same, materially misleading advertisements; instead focusing on the class members' various subjective motivations and understandings of Sears's misrepresentations.

## REASONS FOR GRANTING THE PETITION

### I. An Irreconcilable Conflict Exists Over Whether Predominance Is Met by a Common Objective Misrepresentation on which Consumers Rely Or Whether Class Members' Individual Subjective Motivations for that Reliance Precludes Predominance.

#### A. *The Majority of Circuits Interpret Rule 23(b)(3) Predominance by Objectively Examining Whether the Misrepresentation Is Material, Rather Than Examining Class Members' Varying Subjective Motivations for that Reliance.*

After section (b)(3)'s enactment in 1966, courts gave Rule 23 "a liberal rather than a restrictive interpretation." *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 729 (4th Cir. 1989) (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968), *rev'd on other grounds*, 417 U.S. 156 (1974); *Moss v. Lane Co.*, 50 F.R.D. 122, 125 (W.D. Va. 1970), *aff'd in pertinent part*, 471 F.2d 853 (1973)). The Fourth Circuit in *In re A.H. Robins Co., Inc.* noted that "if there is to be an error made, let it be in favor and not against the maintenance of the class action." 880 F.2d at 729 (citing *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir.1968), *cert. denied*, 394 U.S. 928 (1969); *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1061-62 (8th Cir.1975)).

This view in favor of class actions included section (b)(3), which, based on the Advisory Notes of the 1966

amendment to Rule 23,[6] courts of appeals generally held that:

> . . . causation will be established for class certification purposes, following *Blackie*, for all members of the classes if the omissions are shown to be material. Therefore, the existence of individual issues of reliance do not hinder the predominance of the common question, for the actionability of defendants' conduct is based on the materiality of their omissions and not on the individual reliance of the members of the classes on those omissions.

*Cameron v. E. M. Adams & Co.*, 547 F.2d 473, 477 (9th Cir. 1976) (citing *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975)); *see also Korn v. Franchard Corp.*, 456 F.2d 1206, 1212-1213 (2d Cir. 1972) (holding that individual reliance issues do not predominate over "[t]he existence and materiality of these misrepresentations," where all class members received the same written misrepresentations); *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985) ("presence of individual questions as to the reliance of each investor does not mean that the common questions of law and fact do not predominate").

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[6] The Advisory Notes to the 1966 amendment of Fed. R. Civ. P. 23(b)(3) read, in relevant part:

> A fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class.

The California Supreme Court in *Vasquez v. Superior Court* relevantly examined the degree to which individual reliance must be shown for class members shortly after Rule 23's amendment, holding that a plaintiff must show that a "reasonable man" would rely upon a defendant's misrepresentation:

> If the court finds that a reasonable man would have relied upon the alleged misrepresentations, an inference of justifiable reliance by each class member would arise. It should be noted in this connection that a misrepresentation may be the basis of fraud if it was a substantial factor in inducing the plaintiff to act and that it need not be the sole cause of damage.

4 Cal.3d 800, 815 (1971) (citing *Wennerholm v. Stanford Univ. Sch. of Med.*, 20 Cal. 2d 713, 717 (1942)).

The Second Restatement on Torts also explains that "[r]eliance upon a fraudulent misrepresentation" is objectively shown through a finding that "the misrepresentation is material." Rest. 2d Torts § 538. This showing is not made by proof of each victim's subjective state of mind, but by either finding that:

> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
>
> (b) the maker of the representation knows or has reason to know that its recipient

> regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

*Id.*

Certain courts of appeals adhered to this precedent that where a defendant's fraud involved "common course of conduct," individual issues such as class members' motivations or reliance will not thwart class certification when defendant's misrepresentation is material. *See U.S. Bank Nat. Ass'n v. Sterne, Agee & Leach, Inc.*, 2008 WL 2338016, *2 (9th Cir. 2008) ("In a case involving an alleged omission, upon a finding of materiality there is a rebuttable presumption that the plaintiff relied on the omission.") (citing *Morris v. International Yogurt Co.*, 107 Wash.2d 314 (1986)); *Jenson v. Fiserv Trust Co.*, 256 Fed. Appx. 924, 926 (9th Cir. 2007) (applying presumption of reliance based on material misrepresentations made to consumers investing in Ponzi scheme) (citing *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095 (1993)); *Lozano v. AT & T Wireless Services, Inc.*, 504 F.3d 718, 737 (9th Cir. 2007) (affirming certification of class of telephone customers, and finding presumption of reliance "based on uniform disclosures").

As the First Circuit noted in the securities fraud context, subjectively examining each class members' individual motivations and states of mind with respect to defendant's fraud would "effectively preclude" certification of a Rule 23(b)(3) fraud class. *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 507 (1st Cir. 2005)

("Requiring proof of individualized reliance, of course, would effectively preclude securities fraud class actions under Rule 23(b)(3). Individual issues of reliance would necessarily overwhelm the common ones."). Therefore, most circuits pragmatically (and logically) hold that Rule 23(b)(3) classes should be certified where each class member receives the same, material misrepresentations.

### B. *Other Circuits, Notably the Second, Fifth, and Eleventh Hold that Class Members' Subjective Motivations and Understandings Must Be Shown Under Rule 23(b)(3).*

Despite the Advisory Notes and long-standing rulings favoring an objective approach to Rule 23(b)(3), certain circuits hold that class members' necessarily individual subjective state of minds will predominate over defendant's common, material misrepresentations. *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (holding that "a fraud class action cannot be certified when individual reliance will be an issue").

The new, subjective standard certain circuits apply is summarized by the Second Circuit's *McLaughlin* holding:

> But proof of misrepresentation—even widespread and uniform misrepresentation — only satisfies half of the equation; the other half, reliance on the misrepresentation, cannot be the subject of general proof. Individualized proof is needed to overcome the possibility that a member of the purported

> class purchased Lights for some reason other than the belief that Lights were a healthier alternative—for example, if a Lights smoker was unaware of that representation, preferred the taste of Lights, or chose Lights as an expression of personal style.

*McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008) (decertifying class of "light" cigarette purchasers, despite showing that defendant uniformly omitted the material fact that light cigarettes were no more healthful than regular cigarettes).

The Eleventh Circuit also holds that a court cannot presume reliance for class members on the novel basis that "[a] presumption is generally employed to benefit a party who does not have control of the evidence on an issue," but presuming reliance, even on a material misrepresentation, would unjustly benefit plaintiff and class members who "themselves are in control of this information." *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1362 (11th Cir. 2002) (decertifying fraud and RICO class defrauded by defendant's automated 900 number).

## II. The Seventh Circuit's *Thorogood* Ruling Squarely Sides with Circuits Requiring the Subjective Showing of Class Members' State of Minds to Certify a Rule 23(b)(3) Class.

Rather than employ the objective Rule 23(b)(3) test of whether Sears's uniform misrepresentations were material, the Seventh Circuit in *Thorogood* subjectively

focused on the class members' subjective states of mind, holding that they would predominate:

> The evaluation of the class members' claims will require individual hearings. Each class member who wants to pursue relief against Sears will have to testify to what he understands to be the meaning of a label or advertisement that identifies a clothes dryer as containing a stainless steel drum. Does he think it means that the drum is 100 percent stainless steel because otherwise his clothes might have rust stains, or does he choose such a dryer because he likes stainless steel for reasons unrelated to rust stains and is indifferent to whether a part of the drum not easily seen is made of a different material?

Pet. App. at 25a-26a. The Seventh Circuit reached this conclusion despite the clear findings that (1) all class members received the same written misrepresentations that the Kenmore dryers contained stainless steel drums, and (2) Sears understood this misrepresentation to be material.

First, the record undisputedly shows that Sears provided all class members with the same four written misrepresentations: (1) every laundry dryer included in the Class had "Stainless Steel" printed on the dryers' fronts, which only referred to the drums' composition as nothing else on the dryers were stainless steel, (2) Sears described the drums as being composed of stainless steel at the point of sale at every Sears store, (3) the Parts and Warranty booklets, both on Sears's

website and provided with every Class dryer, represented the dryers' drums only as "stainless steel," and (4) Sears's Kenmore laundry buying guide on its website described the Class dryers as being composed of only stainless steel, which Sears represented as a "Step Up Feature" over drums with either partly or non-stainless steel drums. (*See* Pet. App. at 4a, 7a.)

Second, the record shows that Sears's misrepresentation was material because Sears understood the representation that the drums were stainless steel to materially affect consumers' decisions to purchase laundry dryers. Sears's understanding is first shown in the Sears's head buyer's affidavit. Sears's laundry buyer explained that the "primary factor" in distinguishing dryer models was the model's "performance and quality." The "key metric for a dryer's performance and quality" is the "delivery of superior fabric care." Sears's buyer explained that a stainless steel drum is crucial to its "performance and quality" because it provides substantially superior fabric care based on its resistance to rust, more even heating, snag-free surface, and its resistance to staining from clothing dyes. Therefore, Sears's head buyer's testimony clearly shows that Sears considers the inclusion of a fully stainless steel drum to materially affect a consumer's purchase decision.

Sears's understanding that its "stainless steel drum" advertisement was material is next shown in Sears's Kenmore Buying Guide. The advertisement ranks Sears's dryers as "Good," "Better," and "Best"; listing certain "Step Up Features" that make certain Kenmore laundry dryers better than other Kenmore

models. The first model, described as "Good," provides a dryer with no dryer parts described as stainless steel. The next set of models, described as "Better," presents a list of "Step Up Features," the first of which being a *partly*-stainless steel dryer drum. Finally, the guide presents the "Best" Kenmore laundry dryers, listing the model numbers of which correspond to the model numbers included in the Class Definition. The *first* listed "Step Up Feature" from the "Better" to the "Best" dryer is a "Stainless Steel Drum and Drum Back." The buying guide, therefore, shows that Sears considers a fully stainless steel drum to be such a material representation that it is the *first* "Step Up Feature" that makes a dryer "Best," and further shows that Sears places a premium on these dryers that every class member paid in purchasing these "stainless steel drum" dryers.

Finally, the fact that class members paid a premium for the "stainless steel" drummed dryers shows the materiality of Sears's misrepresentation. Again, Sears advertised the inclusion of a "stainless steel drum" to be a "Step Up Feature" over dryers advertised as either partially stainless steel or fully mild steel, and that the stainless steel drums were only available on the "Best" Kenmore dryers. Because each class member paid a premium for this feature, it can be logically presumed that the inclusion of the purportedly "stainless steel drum" was a material factor in their purchasing decision.

Thus, despite these unrebutted showings that (1) all class members received the same written misrepresentations and (2) Sears's misrepresentation materially affected consumers' purchasing decision, the

Seventh Circuit decertified the class. The Seventh Circuit found that reliance could not be presumed, despite these classwide misrepresentations (Pet. App. 11a), placing the Seventh Circuit squarely against those circuits taking an objective view of Rule 23(b)(3).

## CONCLUSION

Based on the irreconcilable conflicts among the circuits, the Court should grant Mr. Thorogood's petition, issue the writ of certiorari, hear the case, and reverse Seventh Circuit's decertification of those Sears misled.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED NOVEMBER 1, 2007

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

Case No. 06 C 1999

Hon. Harry D. Leinenweber

STEVEN THOROGOOD, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

SEARS, ROEBUCK AND CO.,

Defendant.

**MEMORANDUM OPINION AND ORDER**

### I. BACKGROUND

This is a putative class action brought by Stephen J. Thorogood (hereinafter, "Thorogood"), a purchaser of a clothes dryer from a Johnson City, Tennessee, Sears store against Sears, Roebuck and Co. (hereinafter, "Sears"). Thorogood contends that the dryer's drum

was represented by Sears to be made of stainless steel but this representation was false because a portion of the drum was made of corrodible mild steel. Sears has previously filed a Rule 12(b)(6) Motion to Dismiss all of Thorogood's claims which the Court granted in part, dismissing his warranty and unjust enrichment claims, but denying the Motion as to his claim made pursuant to the Tennessee Consumer Protection Act. Tenn.Code Ann. § 47-18-101, *et seq.* Thorogood has now moved to certify a class of purchasers of the allegedly falsely advertised Sears models who reside in states that have consumer protection statues, similar to Tennessee's, that provide a private cause of action for unfair and deceptive practices that cause an ascertainable loss and are based on the Federal Trade Commission Act. The allegations of the Complaint were set out in detail in the Court's previous Memorandum Opinion and will not be repeated here. *See Thorogood v. Sears, Roebuck and Co.*, 2006 WL 3302640 (N.D.Ill., November 9, 2006).

## II. DISCUSSION

Thorogood argues that the Motion for Class Certification should be granted because Rule 23(a)'s prerequisites are met: Hundreds of thousands of dryers were sold by Sears to a multitude of purchasers (Numerosity), subject to the same false representation that the dryer contained a drum that was made of stainless steel rather than a combination of stainless steel and corrodible mild steel (Common Questions of Law and Fact); that Mr. Thorogood's claim is typical of the class (Typicality); and that he and his counsel will

adequately represent the class (Adequacy of Representation). He also argues that the proposed class satisfies Rule 23(b)(3)'s requirements that common questions of law and fact predominate and that class treatment is a superior method to other available methods for the fair and efficient adjudication of the controversy.

Sears makes a wholesale attack on Thorogood's certification motion, denying that there is numerosity, commonality, typicality, and adequacy of representation, as well as predomination and superiority. Moreover, Sears argues that the Tennessee Act is limited to individual claims and does not allow class action suits and even if it did Thorogood would not be a member of the class because of statute of limitations grounds. Sears' numerosity argument can be flatly rejected as it is really an argument that the class lacks commonality. Thorogood has shown that thousands of individuals purchased Sears clothes dryers that were allegedly falsely advertised as having a stainless steel drum. Thus, numerosity is clearly established.

Sears attacks commonality in both its Rule 23(a) and 23(b)(3) arguments based on its contention that there are numerous and substantial variations of facts of the individual claims and of the laws of the individual states. Thorogood identifies what he believes to be three common factual questions: (1) whether Sears representation that the drums on its dryers were stainless steel constituted a commission of a material fact; (2) whether Sears had any basis to represent that

the drums were stainless steel; and (3) whether the practice complained of constituted an unfair and eceptive business practice. Sears essentially argues that Thorogood cannot prove that Sears made any common representation to the class members or that the members relied upon them. However, Thorogood argues that he can show that each class member was subject to the same uniform representations, *e.g.*, each dryer had imprinted the "stainless steel" representation, in-store advertising represented that the drums were stainless steel, the parts manual and warranty represented the dryer drum as being made of stainless steel, as did the Sears website. Sears does not present any counter evidence that would show that the drums were, in fact, represented as made in part of corrodible mild steel or that any of the Sears' stores varied from the above described advertising and consumer information. *See, Arenson v. Whitehall Convalescent and Nursing Home, Inc.*, 164 F.R.D. 659, 665 (N.D.Ill., 1996). Thus, where there is a uniformity of or standard written representations the court can presume individual reliance. *Id.* at 82; *Peterson v. H & R Block Tax Services, Inc.*, 174 F.R.D. 78, 83 (N.D.Ill., 1997) (Availability of rapid refund loans); and *Garner v. Healy,* 184 F.R.D. 598 (N.D.Ill., 1999) (Whether Turtle Wax was a wax).

With regard to whether the Tennessee Act allows class certifications, as shown by Thorogood, there is a split of authority in Tennessee and the only precedent found in the Seventh Circuit came down on the side of allowing class actions. *In re Bridgestone/Firestone Inc. Tires Product Liability Litigation,* 205 F.R.D. 503

(S.D.Ind., 2001), Rev'd on other grounds, at 288 F.3d 1012 (7th Cir.2002). In that case the district court cited *Califano v. Yamasaki,* 442 U.S. 682, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176 (U.S.Hawai'i 1979) for the proposition that many statutes speak in terms of individual plaintiffs but nevertheless allow class relief if the terms of Rule 23 are met. *Bridgestone/Firestone,* 205 R.F.D. at 514, and held that the Tennessee Act does allow class actions. While *Bridgestone/Firestone* was reversed on appeal to the Seventh Circuit, the reversal was not on the basis of whether the Tennessee Act allowed class actions, but that under the facts of that case, a nationwide class action was not warranted. The allegations were that certain tires contained a defect while others did not and that alleged defects could well react differently in different states. Here the issue is much simpler. Did Sears falsely advertise its dryers as being stainless steel when they were not? So the Seventh Circuit *Bridgestone/Firestone* decision does not undercut the district court decision relative to the Tennessee Act. Moreover, Rule 23 is a procedural statute and under *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (U.S.N.Y.1938) which would trump a state law to the contrary.

Sears further argues that their motion lacks a commonality of legal questions because the state consumer protection statutes contain many variations. It lists six: (1) availability of class action procedure, (2) existence of notice requirements, (3) availability of jury trials, (4) statute of limitations, (5) availability of treble damages, and (6)venue variations. However, state

law variations that are of a procedural nature are not binding on a federal court under *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (U.S.N.Y.1938). Rather the Federal Rules of Civil Procedure apply as provided by the Rules Enabling Act, 28 U.S.C. § 2072. "[T]he *Erie* doctrine applies to any case [diversity or non-diversity] in which state law supplies the rule of decision." *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Company, Inc.,* 313 F.3d 385, 390 (7th Cir.2002). The substantive right is the right to sue. The right to bring a class action, the statute of limitations, treble damages and venue are all matters of procedure that do not implicate the basic right to sue but how you go about it. *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 346 (7th Cir.1997).

Sears' argument against typicality consists of its contention that Thorogood is not a member of the class because he purchased his dryer outside the limitation period. Sears, however, believes that somehow the class period begins at the present rather than on the date Thorogood filed his complaint which was March 9, 2006. The claim period, however, begins five years prior to the filing date. Thus, the class period begins as of March 9, 2001, which is more than five months before Thorogood purchased his dryer on November 23, 2001. Thus, his claim is typical of the class.

Although Sears disputes the adequacy of Thorogood and his counsel because of alleged lack of typicality and the failure to prosecute this suit efficiently, the Court

finds that they have been diligent in presenting the case and they have adequate experience to handle cases of this sort.

The final issue is whether the requirements of Rule 23(b)(3) are satisfied. The Court has already found that there are common issues of law and fact. However, Sears argues that they do not predominate. It argues that the issue of reliance is individual and therefore cannot be determined on a class wide basis. However as shown above, Sears, at least for this motion, has not countered Thorogood's showing that Sears marketed its dryers on a uniform, standard basis. Therefore, as in *Garner*, which also certified a nationwide class, reliance can be presumed. *Garner*, 184 R.F.D. at 602; *Rohlfing v. Manor Care Inc.*, 172 F.R.D. 330 (N.D.Ill., 1997). Thus, the class as proposed by Thorogood can adequately be handled in a class action setting because, the case comes down to whether or not Sears improperly represented that the dryer drum was stainless steel when it was a combination of stainless steel and corrodible mild steel and, if so, whether the class members suffered an ascertainable loss, *i.e.*, the premium, if any, that was paid to obtain the stainless steel drum. The premium would not be great (Sears claims it is non-existent) so that a multitude of individual lawsuits seeking to recover it would be extraordinarily wasteful in judicial resources. Thus, the class action is a superior method of resolving this dispute.

*Appendix A*

## III. CONCLUSION

For the reasons stated herein, the Court hereby grants Plaintiff's Motion for Class Certification. The Court certifies a class defined as:

> All persons residing in the following states:
>
> Alaska, California, Connecticut, the District of Columbia, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia or Wisconsin;

who purchased one of the following models of Kenmore dryer:

| | | |
|---|---|---|
| 417.69042990, | 417.69052990, | 417.79042990, |
| 417.79052990, | 417.80042990, | 417.80052990, |
| 417.80142000, | 417.81042000, | 417.81052000, |
| 417.81142000, | 417.82042100, | 417.82052100, |
| 417.82142100, | 417.83042200, | 417.83042201, |
| 417.83042300, | 417.83052200, | 417.83052201, |
| 417.83142200, | 417.83142201, | 417.83142300, |
| 417.84072300, | 417.84082500, | 417.84092500, |
| 417.90042990, | 417.90052990, | 417.90142000, |
| 417.91042000, | 417.91052000, | 417.91142000, |
| 417.92042100, | 417.92052100, | 417.92142100, |

417.93042200, 417.93042202, 417.93042203,
417.93042300, 417.93052200, 417.93052201,
417.93052202, 417.93052203, 417.93142200,
417.93142201, 417.93142202, 417.93142203,
417.93142300, 417.94072300, 417.94072301,
417.94082500, or 417.94092500;

in the previous five years.

**IT IS SO ORDERED.**

s/ Harry D. Leinenweber
Harry D. Leinenweber, Judge
United States District Court

**DATE:** November 1, 2007

## APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED FEBRUARY 1, 2008

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
**CHICAGO, ILLINOIS 60604**

February 1, 2008

*Before*

**Hon.** JOHN L. COFFEY, *Circuit Judge*

**Hon.** JOEL M. FLAUM, *Circuit Judge*

**Hon.** ILANA DIAMOND ROVNER, *Circuit Judge*

No. 07-8036

IN RE:

SEARS, ROEBUCK & COMPANY

Petitioner.

Petition for Permission to Appeal
Pursuant to F.R.C.P. 23(f)

No. 06 C 1999

*Appendix B*

Northern District of
Illinois, Eastern Division.

Harry D. Leinenweber,
Judge.

Upon consideration of the **DEFENDANT-PETITIONER'S PETITION FOR PERMISSION TO APPEAL CLASS CERTIFICATION ORDER PURSUANT TO FED. R. CIV. P. 23(f)**, filed on November 10, 2007, by counsel,

**IT IS ORDERED** that the petition is **DENIED**.

## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILED FEBRUARY 5, 2008

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
**CHICAGO, ILLINOIS 60604**

**AMENDED** February 4, 2008
February 1, 2008

*Before*

**Hon.** JOHN L. COFFEY, *Circuit Judge*

**Hon.** JOEL M. FLAUM, *Circuit Judge*

**Hon.** ILANA DIAMOND ROVNER, *Circuit Judge*

No. 07-8036

IN RE:

SEARS, ROEBUCK & COMPANY

Petitioner.

Petition for Permission to Appeal
Pursuant to F.R.C.P. 23(f)

No. 06 C 1999

*Appendix C*

Northern District of
Illinois, Eastern Division.

Harry D. Leinenweber,
Judge.

The following are before the court:

1) **DEFENDANT-PETITIONER'S PETITION FOR PERMISSION TO APPEAL CLASS CERTIFICATION ORDER PURSUANT TO FED.R.CIV.P. 23(f)**, filed on November 16, 2007, by counsel for the petitioner.

2) **RESPONDENT'S CORRECTED RESPONSE TO PETITIONER'S RULE 23(f) PETITION FOR LEAVE TO APPEAL THE GRANT OF CLASS CERTIFICATION**, filed on December 13, 2007, by counsel for the respondent.

3) **REPLY IN SUPPORT OF DEFENDANT-PETITIONER'S PETITION FOR PERMISSION TO APPEAL CLASS CERTIFICATION ORDER PURSUANT TO FED.R.CIV.P. 23(f)**, filed on December 26, 2007, by counsel for the petitioner.

**IT IS ORDERED** that #1 is **DENIED**.

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MARCH 4, 2008

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
**CHICAGO, ILLINOIS 60604**

March 4, 2008

*Before*

JOHN L. COFFEY, *Circuit Judge*

JOEL M. FLAUM, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 07-8036

IN RE:

SEARS, ROEBUCK & COMPANY

Petitioner.

Petition for Permission to Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Harry D. Leinenweber,
Judge.

*Appendix D*

Upon consideration of the **DEFENDANT-PETITIONER SEARS, ROEBUCK AND CO.'S PETITION FOR REHEARING AND REHEARING EN BANC,** filed on February 15, 2008,

**IT IS ORDERED** that the petition is **GRANTED** to the extent that petitioner's petition for rehearing is **GRANTED.**

**IT IS FURTHER ORDERED** that the petitioner's petition for permission to appeal the district court's class certification order pursuant to Federal Rule of Civil Procedure 23(f) is **GRANTED.** Petitioner shall pay the required appellate fees to the clerk of the district court within ten days from the entry of this order pursuant to Federal Rule of Appellate Procedure 5(d)(1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket.

In light of the foregoing, the respondent need not file an answer to the petition for rehearing and petition for rehearing en banc.

## APPENDIX E — OPINION OF THE UNITED STATES COURTOF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 28, 2008

## IN THE UNITED STATES COURTOF APPEALS FOR THE SEVENTH CIRCUIT

No. 08-1590

STEVEN J. THOROGOOD, individually and on behalf of all others similarly situated,

*Plaintiff-Appellee,*

*v.*

SEARS, ROEBUCK AND COMPANY,

*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 06 C 1999—**Harry D. Leinenweber**, *Judge*

ARGUED SEPTEMBER 15, 2008—DECIDED OCTOBER 28, 2008

Before POSNER, KANNE, and EVANS, *Circuit Judges.*

POSNER, *Circuit Judge.* The plaintiff, a Tennessean, bought a Kenmore-brand clothes dryer from Sears Roebuck (Kenmore is a Sears brand name). The words "stainless steel" were imprinted on the dryer, and point

of sale advertising explained that this meant that the drum in which the clothes are dried inside the dryer was made of stainless steel. The plaintiff says he thought it meant that the drum was made *entirely* of stainless steel. Part of the front of the drum, a part the user would see only if he craned his head inside the drum, is made of a ceramic-coated "mild" steel, which is not stainless steel because it doesn't contain chromium; stainless steel is a steel alloy that is at least 11.5 percent chromium. The plaintiff alleges that the mild-steel part of the drum rusted and stained the clothes that he dried in his dryer.

He filed this class action suit in federal district court on behalf of himself and the other purchasers, scattered across 28 states plus the District of Columbia, of the half million or so Kenmore dryers advertised as containing stainless steel drums. He claims that the sale of a dryer so advertised is deceptive unless the drum is made entirely of stainless steel, since if it is not it may rust and cause rust stains on the clothes in the dryer. His individual claim is that the representation that the dryer contained a stainless steel drum violated the Tennessee Consumer Protection Act, Tenn.Code. Ann. §§ 47-18-101 *et seq.* The Act provides in pertinent part that "any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages." *Id.*, § 47-18-109(a)(1).

*Appendix E*

The members of the class that the plaintiff represents are alleged to have similar claims under similarly worded state consumer protection statutes in their own states. Although some members of the huge class are citizens of the states of which Sears is a corporate citizen (New York and Illinois), so that diversity of citizenship is not complete, the suit properly invoked federal jurisdiction under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711-1715, since the amount in controversy exceeds $5 million. The district court certified the class, and we have accepted the defendant's appeal from the class certification. Fed. R. Civ. P. 23(f).

The class action is an ingenious device for economizing on the expense of litigation and enabling small claims to be litigated. The two points are closely related. If every small claim had to be litigated separately, the vindication of small claims would be rare. The fixed costs of litigation make it impossible to litigate a $50 claim (our guess—there is no evidence—of what the average claim of a member of the plaintiff's class in this case might be worth) at a cost that would not exceed the value of the claim by many times. But the class action device has its downside, or rather downsides. There is first of all a much greater conflict of interest between the members of the class and the class lawyers than there is between an individual client and his lawyer. The class members are interested in relief for the class but the lawyers are interested in their fees, and the class members' stakes in the litigation are too small to motivate them to supervise the lawyers in an effort to make sure that the lawyers will act in their best interests.

*Saylor v. Lindsley,* 456 F.2d 896, 900-01 (2d Cir.1972) (Friendly, J.); see also Susan P. Koniak & George M. Cohen, "Under Cloak of Settlement," 82 *Va. L.Rev.* 1051, 1053-57 (1996) (describing the class action as "lawyer self-dealing on a grand scale," *id.* at 1053); Jonathan R. Macey & Geoffrey P. Miller, "The Plaintiff's Attorney's Role in Class Action and Derivative Litigation," 58 *U. Chi. L.Rev.* 1, 22-26 (1991).

The defendants in class actions are interested in minimizing the sum of the damages they pay the class and the fees they pay the class counsel, and so they are willing to trade small damages for high attorneys' fees, especially since, as Judge Friendly put it, "a juicy bird in the hand is worth more than the vision of a much larger one in the bush, attainable only after years of effort not currently compensated and possibly a mirage." *Alleghany Corp. v. Kirby,* 333 F.2d 327, 347 (2d Cir.1964); see also Bruce L. Hay, "Asymmetric Rewards: Why Class Actions (May) Settle for Too Little," 48 *Hastings L.J.* 479, 485-89 (1997); Bruce L. Hay & David Rosenberg, " 'Sweetheart' and 'Blackmail' Settlements in Class Actions," 75 *Notre Dame L.Rev.* 1377, 1389-92 (2000). The result of these incentives is to forge a community of interest between class counsel, who control the plaintiff's side of the case, and the defendants. (For a notable example, see *Reynolds v. Beneficial National Bank,* 288 F.3d 277 (7th Cir.2002); see also *Mars Steel Corp. v. Continental Illinois National Bank & Trust Co.,* 834 F.2d 677, 681-82 (7th Cir.1987).) The judge who presides over the class action and must approve any settlement is charged with

responsibility for preventing the class lawyers from selling out the class, but it is a responsibility difficult to discharge when the judge confronts a phalanx of colluding counsel.

A further problem with the class action is the enhanced risk of costly error. "When enormous consequences turn on the correct resolution of a complex factual question, the risk of error in having it decided once and for all by one trier of fact rather than letting a consensus emerge from several trials may be undue." *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910, 912 (7th Cir.2003); see also *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir.1996); Lance P. McMillian, "The Nuisance Settlement 'Problem,' " 31 *Am. J. Trial Advoc.* 221, 252-53 (2007); Jeffrey W. Stempel, "Class Actions and Limited Vision," 83 *Wash. U. L.Q.* 1127, 1213-14 (2005). Suppose a company is sued in a number of different cases for selling a defective product. It wins some of the cases and loses some, so that the aggregate outcome is a fair reflection of the uncertainty of the plaintiffs' claims. But when the central issue in a case is given class treatment and so resolved by a single trier of fact, a trial becomes a roll of the dice; a single throw will determine the outcome of a large number of separate claims—there is no averaging of divergent responses from a number of triers of fact having different abilities, priors, and biases.

The risk is asymmetric when the number of claims aggregated in the class action is so great that an adverse verdict would push the defendant into bankruptcy, for

then the defendant will be under great pressure to settle even if the merits of the case are slight. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir.1995); Hay, " 'Sweetheart' and 'Blackmail' Settlements in Class Actions," *supra*, at 1391-92; Barry F. McNeil & Beth L. Fancsal, "Mass Torts and Class Actions: Facing Increased Scrutiny," 167 F.R.D. 483, 489-90 (1996). It is true that in principle and often in practice, shareholders whose shares in a particular company are part of a diversified portfolio of securities are indifferent to the fortunes of a particular stock in their portfolio. But corporate managers—the shareholders' imperfect agents—are not indifferent to bankruptcy and so they are unwilling to bet their company on the outcome of a trial. This, however, is not such a case, as the aggregate claims are well within Sears Roebuck's ability to pay.

There is still another downside to the class action, and it is well illustrated by this case. It is the tendency, when the claims in a federal class action are based on state law, to undermine federalism. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020-21 (7th Cir.2002); *In re Rhone-Poulenc Rorer, Inc., supra*, 51 F.3d at 1300-02; *Elizabeth M. v. Montenez*, 458 F.3d 779, 788 (8th Cir.2006). Our plaintiff wants to litigate in a single federal district court half a million claims wrested from the control of the courts of the 29 jurisdictions in which those claims arose and the laws of which govern the claimants' entitlement to and scope of relief. The instructions to the jury on the law it is to apply will be an amalgam of the consumer protection laws of the 29 jurisdictions, and procedural rules by which particular jurisdictions

expand or contract relief will be ignored. The Tennessee Consumer Protection Act, for example, does not authorize class actions. *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301 (Tenn.2008).

Sears argues that the Tennessee rule precludes the maintenance of the present case as a class action. That is wrong. The procedure in diversity suits is governed by federal law. What is true is that some procedural rules are intended to implement substantive policy, and such rules do control in diversity cases. The clearest example is the parol evidence rule of contract law. Another is the contract doctrine of "mend the hold," which limits the right of the defendant in a breach of contract suit to change his defense in the course of litigation and is thus a facet of the doctrine of good-faith performance of contracts. *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 364-65 (7th Cir.1990). We gave another example in *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District*, 60 F.3d 305, 310 (7th Cir.1995): "Suppose a state (as many states have done) establishes a compulsory arbitration mechanism in medical malpractice cases in order to cut down on litigation and reduce malpractice insurance premiums. The state's goals are substantive-designed to shape conduct outside the courtroom and not just improve the accuracy or lower the cost of the judicial process—though the means are procedural. The goals would be thwarted if parties having access to a federal district court under the diversity jurisdiction could thumb their noses at the compulsory procedure." In contrast, the holding of the *Walker* decision that consumer protection suits can't be

maintained under Tennessee law as class actions was a "plain meaning" statutory interpretation and did not suggest that the class action had been precluded in consumer protection suits in order to advance a substantive policy concerning consumer protection.

Still, Sears is on to something. Even though the plaintiff bases his claim, and that of any other Tennesseans who happen to be members of the class, on Tennessee law, he and they are seeking a breadth of relief that Tennessee does not offer them in its courts. Maybe that is a defect of Tennessee law. But the purpose of the diversity jurisdiction is to protect out-of-state residents against state judicial bias in favor of residents; it is not to expand the relief obtainable under state law.

The concerns that we have expressed (which are amplified, and supported by copious references, in our opinion in *In re Rhone-Poulenc, Inc., supra,* and in such later opinions, apart from those cited already, as *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir.2001); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir.1999); *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2d Cir.2003), and *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165-68 (3d Cir.2001)) suggest caution in class certification generally. And this case turns out to be a notably weak candidate for class treatment. Apart from the usual negatives, there are no positives: not only do common issues of law or fact not predominate over the issues particular to each purchase and purchaser of a "stainless steel" Kenmore dryer, as Rule 23(b)(3) of the

Federal Rules of Civil Procedure requires, but there are *no* common issues of law or fact, so there would be no economies from class action treatment.

The plaintiff claims to believe that when a dryer is labeled or advertised as having a stainless steel drum, this implies, without more, that the drum is 100 percent stainless steel because otherwise it might rust and cause rust stains in the clothes dried in the dryer. Do the other 500,000 members of the class believe this? Does *anyone* believe this besides Mr. Thorogood? It is not as if Sears advertised the dryers as eliminating a problem of rust stains by having a stainless steel drum. There is no suggestion of that. It is not as if rust stains were a common concern of owners of clothes dryers. There is no suggestion of that either, and it certainly is not common knowledge. (At argument the plaintiff's lawyer, skeptical that men ever operate clothes dryers—oddly, since his client does—asked us to ask our wives whether they are concerned about rust stains in their dryers. None is.) Stainless steel appliances are common even when no issue of rust is presented. A porcelain sink does not rust, but many people prefer a stainless steel sink, partly because it does not stain, partly because when polished it looks better (some people think) than porcelain, but not because they think a sink made of "mild" steel coated with ceramic would cause rust stains on their dishes; ceramic doesn't rust. It is true that the drum is inside the dryer, and you see only its shiny surface when you open the door; but the same is true of dishwashers, many of which are stainless steel too.

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Stainless steel clothes dryers are not advertised as preventing rust stains on clothes. The only reference to rust in Sears's marketing that the plaintiff refers to or that we have found is "Stainless Steel Drum resists rust and won't chip, peel or snag clothes." The only thing potentially deceptive about this claim is that a ceramic coating on non-stainless steel is unlikely to rust, chip, peel, or snag clothes either. But that is not Mr. Thorogood's complaint. His concerns are idiosyncratic. A further indication of this is that to rally fellow victims of the stainless steel Kenmores he posted his bad experience on a web site ("Fight Back.com," http:// fightback. com) that advertises itself as a "conduit for consumer problem solving and redress." No one responded, as the "feed back" file on the web site invites persons who agree with a posted complaint to do.

The evaluation of the class members' claims will require individual hearings. Each class member who wants to pursue relief against Sears will have to testify to what he understands to be the meaning of a label or advertisement that identifies a clothes dryer as containing a stainless steel drum. Does he think it means that the drum is 100 percent stainless steel because otherwise his clothes might have rust stains, or does he choose such a dryer because he likes stainless steel for reasons unrelated to rust stains and is indifferent to whether a part of the drum not easily seen is made of a different material? Sears does not advertise its stainless steel drum as a protection against rust stains on clothes; it does not even say that the drum itself will not rust—only that it "resists rust." Advertisements for clothes

dryers advertise a host of features that might matter to consumers, such as price, size, electrical usage, appearance, speed, and controls, but not, as far as anyone in this litigation has suggested except the plaintiff, avoidance of clothing stains due to rust.

In granting class certification, the district judge said that because "Sears marketed its dryers on a class wide basis . . . reliance can be presumed." Reliance on what? On stainless steel preventing rust stains on clothes? Since rust stains on clothes do not appear to be one of the hazards of clothes dryers, and since Sears did not advertise its stainless steel dryers as preventing such stains, the proposition that the other half million buyers, apart from Thorogood, shared his understanding of Sears's representations and paid a premium to avoid rust stains is, to put it mildly, implausible, and so would require individual hearings to verify.

An additional variable in the class action calculus is relief. Even if some consumers, like Mr. Thorogood, would not pay a premium for a stainless steel drum that was not 100 percent stainless steel, the amount of damages will vary from consumer to consumer. Some may (though we are dubious) have experienced rust stains, or be fearful of experiencing them, and therefore seek as damages the difference between the resale value of their stainless steel dryer and what a new dryer would cost. Some may have bought a Kenmore at a discount and so ended up paying no more than they would have paid for a machine with a porcelain drum. And some—

because the stainless steel drum is packaged with other premium features rather than offered as a separately priced option—may have incurred no damages at all because on the whole they prefer their stainless steel dryer to any other dryer they could buy even if the stainless steel feature itself was a neutral or even negative consideration in their purchasing decision. The plaintiff is seeking on behalf of himself and the members of the class actual damages, not statutory damages, which might not require individual proof.

The difficulty of determining the relief to which the individual class members are entitled, though serious, is not the deal breaker. If it were proved that *X* thousand buyers of Kenmores had been deceived, a settlement that provided each with an amount equal to an estimate of the average damages they had sustained would be a sensible and legally permissible alternative to remitting all the buyers to individual suits each of which would cost orders of magnitude more to litigate than the claims would be worth to the plaintiffs. "Aggregate class proof of monetary relief may . . . be based on sampling techniques or other reasonable estimates, under accepted rules of evidence." 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 10.3, p. 480 (4th ed.2002); see also *id.*, § 10.5; *Stewart v. General Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir.1976); *United States v. City of Miami*, 195 F.3d 1292, 1299-1300 (11th Cir.1999); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 259-63 (5th Cir.1974). The deal breaker is the absence of any reason to believe that

there is a single understanding of the significance of labeling or advertising clothes dryers as containing a "stainless steel drum."

The district court is instructed to decertify the class.

REVERSED.

## APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED DECEMBER 15, 2008

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
**CHICAGO, ILLINOIS 60604**

December 15, 2008

*Before*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 08-1590

STEVEN J. THOROGOOD, individually and on behalf of all other similarly situated,

*Plaintiff-Appellee,*

*v.*

SEARS, ROEBUCK AND COMPANY,

*Defendant-Appellant.*

*Appendix F*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 1999

Harry D. Leinenweber, *Judge.*

**ORDER**

On November 12, 2008, plaintiff-appellee filed a petition for rehearing with suggestion for rehearing *en banc*, and on December 1, 2008, defendant-appellant filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the judges in regular active service has requested a vote on the petition for rehearing *en banc*.* The petition is therefore **DENIED**.

---

* Circuit Judge Ann Claire Williams took no part in the consideration of this matter.

(2)

08-1412

No. 08-[redacted]

FILED
JUL 17 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

**STEVEN J. THOROGOOD, on behalf of himself and all others similarly situated,**
*Petitioner,*

v.

**SEARS, ROEBUCK AND CO.,**
*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly rejected class certification of a putative class action alleging consumer fraud under the laws of 29 states because of the presence of individualized issues precluding class treatment, including those related to whether particular class members relied on the alleged misrepresentations.

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Respondent Sears, Roebuck and Co. states that its parent company is Sears Holding Corporation, which owns 100% of Respondent's stock.

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## OPINIONS BELOW

The court of appeals' opinion reversing the district court's certification of the class is reported at 547 F.3d 742 (7th Cir. 2008). Pet.App. 16a-28a. The district court's certification order is not reported, but may be accessed at 2007 U.S. Dist. LEXIS 81035 (N.D. Ill. Nov. 1, 2007). Pet.App. 1a-9a.

## COUNTERSTATEMENT OF THE CASE

Respondent Sears, Roebuck and Co. ("Sears") has exclusively sold laundry appliances under the Kenmore name for more than 80 years. SA 147-48.[1] Kenmore laundry appliances are designed and manufactured by Whirlpool and Electrolux Home Products. SA 148.

### A. Varying Features Offered with Kenmore Dryers

Sears' dryers are equipped with different combinations of features depending on customers' diverse preferences. Many factors influence which features are included with any given dryer model. *Id.*

Consumers typically purchase washers and dryers as a set. *Id.* Numerous variables affect the particular washer and dryer set that a consumer chooses to buy. Integrating laundry products into

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[1] References to "SA" are to the "Separate Appendix of Defendant-Appellant" filed on April 21, 2008 in the court of appeals.

household décor, aesthetics, noise reduction, and space requirements are increasingly important considerations for consumers. SA 149. Dryers have a combination of features (including heat or moisture sensors, larger capacity, and automatic features), and combined features vary from dryer to dryer. SA 148. Customers may prefer dryers that have more settings, have automatic settings, save space, or offer larger capacities. SA 149.

**B. Petitioner's Dryer**

In November 2001, petitioner Steven J. Thorogood purchased his Kenmore (Model No. 417.8114200) from a Sears store in Tennessee, as part of a washer-dryer set. Pet. App. 6a. Although the petition extensively discusses Sears' online advertising (*e.g.*, Pet. 10), petitioner Thorogood conducted no research and viewed no Sears advertisements prior to buying his dryer. SA 164-65. He also did not see any internet materials or manuals relating to his dryer in advance of his purchase. *Id.* His only research was conducted on the floor of the store that day, and it was there that Thorogood decided to purchase the washer and dryer. *Id.* Indeed, the set Thorogood purchased was the first that he came upon in the store. SA 165.

At the store, Thorogood saw no signs, ads, catalogues, or other marketing materials stating that the dryer's drum was 100% stainless steel. SA 199. The dryer's console contains the words "stainless steel" and Thorogood alleges that a display card at the Tennessee store said "stainless steel." SA 165-66. Thorogood further testified that he has no

evidence that Sears ever expressly stated that the drum was 100% stainless steel and no evidence that Sears intended to deceive consumers into believing that the drums were 100% stainless steel. SA 186, 199. Thorogood also testified that he has no basis to believe that "consumers understand the word stainless steel to mean 100% stainless steel." SA 222.

Although Thorogood implies that stainless steel is used only for its rust resistance (Pet. 6), in fact, drums containing stainless steel also offer customers more even heating, a snag-free surface, and a sleek look. SA 149. Drums containing stainless steel also resist staining from clothing dyes that may re-release into subsequent loads and cause dingier whites. *Id.* In short, stainless steel dryer drums provide many benefits separate and apart from improved rust resistance. *Id.*

Thorogood's family used the dryer daily for four years and during that period it performed flawlessly. SA 37, 174. Thorogood alleges that in November 2005—some four years after the purchase—he discovered that the epoxy coating on the mild steel flange had been worn away by the Teflon and felt pads of the suspension system, and, as a result, had begun to rust. SA 181. He knows no other purchasers who experienced similar problems with their dryers, notwithstanding his attempts to find other dissatisfied purchasers. SA 185, 200-01.

### C. Procedural History

Petitioner filed a putative class action alleging that Sears' description of his Kenmore clothes dryer as "stainless steel" violated the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. §47-18-101. Thorogood ultimately sought class certification based on the consumer fraud laws of 29 states whose law he claimed provided principles suitable for class adjudication. Sep.Apx 138-45, 151-55.

At bottom, petitioner's claim is that it was fraudulent for Sears to describe the dryer's drum as stainless steel when, in addition to the stainless steel contained in the rest of the drum, the front flange of the drum in Thorogood's dryer is constructed out of ceramic-coated mild steel. Pet. 2a. According to Thorogood, this front flange, in turn, is susceptible to rust, which could damage clothing dried in the dryer. *Id.* His charge of fraud, therefore, depended on the multiple inferences that Sears' statement that the drums in the dryers at issue were "stainless steel" necessarily meant "100% stainless steel," and that "100% stainless steel," in turn, necessarily meant "rust-free for the life of the machine" and "will never cause rust damage to clothes." *Cf.* Pet.App. 24a (summarizing inferences made by petitioner).

There is no evidence that Sears ever made any of the representations that petitioner sought to infer from the statement that his dryer was "stainless steel." Thorogood certainly did not show that Sears made any uniform statements in advertisements in the 29 states at issue that its dryers were "100%" or "fully" stainless steel, or "would always be rust free."

The district court nevertheless granted petitioner's motion for certification of a class of consumers who reside in 29 states having consumer protection statutes "that provide a private cause of action for unfair and deceptive practices that cause an ascertainable loss[.]" Pet.App. 2a. *See also* Pet.App. 8a (listing 29 putative class jurisdictions). With respect to common questions of fact, the district court accepted petitioner's argument "that the class was subject to the same false representation that the dryer contained a drum that was made of stainless steel rather than a combination of stainless steel and corrodible mild steel" and concluded that, as a matter of law, "where there is uniformity of or standard written representations the court can *presume* individual reliance." Pet.App. 2a, 4a (emphasis added). The district court also determined that the "ascertainable losses" of all class members would be the "premium" that they paid for the dryer, "if any." Pet.App. 7a.

Sears sought interlocutory review of the certification order by the court of appeals pursuant to Fed. R. Civ. P. 23(f). On October 28, 2008, the Seventh Circuit unanimously reversed the district court's certification order. The court of appeals observed that petitioner's allegations were "notably weak for class treatment." Pet.App. 23a. The court determined that certification was improper because there was no evidence regarding whether other class members shared Thorogood's professed understanding of the import of Sears' statements and thus, on this record, class-wide reliance was "implausible." Pet.App. 26a. In view of the

inferences that Thorogood sought to draw from Sears' statements about stainless steel in its dryers, the court of appeals also held that individualized hearings as to each class member's understanding of Sears' alleged misrepresentations would be required. *Id.*[2]

## REASONS FOR DENYING THE PETITION

The decision below presents no issue warranting review by this Court. The Seventh Circuit applied settled principles of law to the facts of this case, and reached a correct result that does not conflict with any decision of this Court or any other federal appellate court.

There is no merit to petitioner's contention that there is a conflict among the lower federal appellate courts with respect to the appropriate standard under Fed. R. Civ. P. 23(b) for assessing predominance in class action cases alleging consumer fraud. The question as to which Thorogood posits a conflict is whether an "objective" test permitting reliance to be presumed or a "subjective"

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[2] Following the Seventh Circuit's decertification of the class, the case proceeded in the district court on Thorogood's individual claim. On July 1, 2009, the district court granted Sears' motion to dismiss Thorogood's action on the ground that Sears' $20,000 offer of judgment mooted his individual claim and divested the court of subject matter jurisdiction because this offer exceeded the total amount of damages, inclusive of attorneys' fees and costs, to which Thorogood was entitled pursuant to the TCPA. *See* District Court Order, Docket Entry # 136 (N.D. Ill. July 1, 2009). On July 13, 2009, Thorogood moved for reconsideration of this ruling. *See* Motion of Plaintiff Steven J Thorogood for Reconsideration Regarding Terminate Hearings, Docket Entry # 137 (filed July 13, 2009).

test requiring proof of each class member's reliance on the alleged misrepresentations should be applied to the consumer fraud claims he purports to assert on behalf of class members in 29 states. The answer to that question turns not upon any question of federal law, but upon the substantive elements for establishing a consumer fraud claim under the laws of these 29 states, which must be considered to determine whether common issues predominate over individual ones.

The federal cases that petitioner cites provide no support for his contentions that there is any conflict of federal law regarding whether an "objective" or "subjective" standard for proving reliance applies in consumer fraud cases. The cases on which Thorogood principally relies involve federally regulated securities and claims asserted under federal securities law. Those cases are, accordingly, irrelevant to the state law issues raised by the petition. Indeed, courts have repeatedly held that the fraud-on-the market theory utilized in federal securities cases has no application to the consumer fraud claims at issue here.

Certification of the instant case as a class action also was inappropriate in light of the numerous material variations among the laws of the 29 jurisdictions that Thorogood sought to invoke. Far from supporting any uniform standard as to a presumption of reliance, the applicable state laws impose varying requirements for proving reliance and the other elements for establishing liability. These differing standards preclude classwide adjudication of petitioner's consumer fraud claims.

Such additional infirmities render the Seventh Circuit's decision particularly unsuited for review by this Court.

## I. THE PETITION RAISES QUESTIONS THAT TURN EXCLUSIVELY ON STATE LAW AND DO NOT WARRANT THIS COURT'S REVIEW

Certiorari should be denied because—at the core of the petition—the conflict it posits presents no question of federal law at all. State law, and not federal law, determines what elements, including reliance, must be satisfied to prove fraud in the 29 jurisdictions as to which Thorogood sought a class adjudication. The elements for proving fraud under the laws of these 29 jurisdictions, in turn, control assessment of whether the claims are suitable for class treatment under Fed. R. Civ. P. 23.

This Court definitively resolved the matter more than three decades ago in rejecting application of a single or "uniform" law in multi-state class actions. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985), the Court held that due process requires the law of each applicable state law to be given effect. *Accord Georgine Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997). Moreover, it is well-accepted that, under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the substantive state law of fraud is applicable when (as here) federal jurisdiction is predicated upon diversity of citizenship. *See, e.g., Hanson v. Ford Motor Co.*, 278 F.2d 586, 590 (8th Cir. 1960) (Blackmun, J.); *see also Rodi v. S. N.E. Sch. of Law*, 389 F.3d 5, 13 (1st

Cir. 2004); *Christopher's Ariz. Transp. Serv. v. Duncan*, 2000 U.S. App. LEXIS 15644, at *9 (4th Cir. July 6, 2000); *Holm v. Shilensky*, 388 F.2d 54, 56 n.2 (2d Cir. 1968).

Petitioner highlights the fallacy of his contention of an "irreconcilable conflict" in federal precedent as to the test for reliance in consumer fraud cases (Pet. 27) by relying heavily on a California Supreme Court decision, *Vasquez v. Superior Court*, 4 Cal.3d 800 (1971).[3] California was among the group of 29 jurisdictions whose consumer fraud laws Thorogood sought to invoke in seeking class certification in the district court. Pet.App. 8a. State court authority addressing the standards for proving fraud under state law plainly does not establish a conflict among the federal appellate circuits as to any question of federal law that could support certiorari under Supreme Court Rule 10.[4]

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[3] It also is questionable whether, even as a matter of California precedent, *Vasquez* remains good law for the proposition for which it is cited. The portion of *Vasquez* cited in the petition was effectively overruled by California's voters. In 2004, California passed Proposition 64, which reinstates the reliance requirement in consumer actions under California law. *See, e.g., Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 437-38 n.6 (C.D. Cal. 2007) (inferring reliance in consumer actions "may no longer be good law in California"); *see also* Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 37 (2006) ("Proposition 64 effectively forecloses suits by private plaintiffs who have not suffered a loss in reliance on a manufacturer's misrepresentation").

[4] For the same reason, petitioner's reliance on the *Second Restatement of Torts* section addressing state law fraud

Because the complaint brought an action under the TCPA, and sought certification based on the consumer fraud laws of 29 separate jurisdictions, any "presumption of reliance" would necessarily require the application of substantive state law. Accordingly, the court of appeals' refusal to presume reliance on a classwide basis in this case does not implicate any issue of federal law.

## II. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO ANY QUESTION OF FEDERAL LAW.

### A. The Fraud-on-the-Market Theory Utilized for Federal Securities Violations Has No Application in State Law Consumer Fraud Class Actions.

There is no merit to petitioner's assertion of any conflict on a question of federal law. In particular, there is no merit to his contention that the First and Ninth Circuits constitute a "majority" of federal circuits that presume reliance in consumer fraud cases. Pet. 26.[5] *In re Xcelera.com Sec. Litig.*,

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standards (Pet. 28) is similarly misplaced and cannot support the existence of a conflict as to any issue of federal law.

[5] In his statement of the question presented, Thorogood indicates that the Ninth and Tenth Circuits, rather than the First and Ninth Circuits, employ the so-called "objective" test. *See* Pet. i. But the text of the petition cites no Tenth Circuit decision on this point. *See id.* at 26-31. Moreover, petitioner's suggestion that the cases he cites from the First and Ninth Circuits (Pet. 26) represent the "majority" approach of employing an "objective" test for assessing reliance is

430 F.3d 503 (1st Cir. 2005), the only First Circuit case cited (Pet. 29), involved a claim alleging securities fraud under federal law. That case has no bearing on the elements required to establish consumer fraud under the laws of the 29 states invoked by petitioner. The Ninth Circuit case, *U.S. Bank Nat. Ass'n v. Sterne, Agee & Leach, Inc.*, 281 Fed. Appx. 740 (9th Cir. June 6, 2008), which Thorogood cites (Pet. 29), is irrelevant for the same reason.[6]

Federal securities fraud claims also have no relevance here because they are governed by unique rules having no application to the state law consumer fraud claims. In federal securities fraud

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contradicted later in the petition when Thorogood cites decisions from *four* Circuits (the Second, Fifth, and Eleventh, along with the Seventh Circuit's decision below) as employing the "*subjective*" test for establishing reliance in such cases. *See id.* at 30-35.

[6] Petitioner's reliance (Pet. 29) on both *U.S. Bank Nat. Ass'n* and *Jenson v. Fiserve Trust Co.*, 256 Fed. App. 924 (9th Cir. Nov. 26, 2007), also is misplaced because these decisions are unpublished. These cases involved alleged misrepresentations about financial investments and not consumer goods, and are not inconsistent with the cases establishing that reliance cannot be presumed in cases alleging fraud in connection with the sale of consumer goods. Even if they were actually inconsistent with other case law, however, these unpublished cases lack precedential value in the Ninth Circuit. *See* 9th Cir. R. 36-3(a); *Hart v. Massanari*, 266 F.3d 1155, 1160 n.2 (9th Cir. 2001) (courts are free to "disregard earlier rulings that are designated as nonprecedential"). Accordingly, these cases, which do not bind even the Ninth Circuit, could not present a square conflict supporting review by this Court even if they actually did conflict with case law from other circuits.

cases, courts employ the fraud-on-the-market theory, which presupposes that "most publicly available information is reflected in the market price," and that any alleged misstatement about a stock will be reflected in that stock's price. *Basic, Inc. v. Levinson*, 485 U.S. 224, 244 (1988) ("In an open and developed market, the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value") (citation omitted). Recognizing that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price," courts applying this theory have concluded that an investor's reliance on any public material misstatements about a regulated security may properly be presumed in cases alleging federal securities fraud even if the investor in question was not actually aware of such misstatements. *See id.* at 247.[7]

In contrast, federal courts repeatedly have refused to presume reliance in the consumer fraud context because the consumer goods market is not a perfect market supporting a presumption that particular misrepresentations necessarily would have affected that consumer's decision to buy a

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[7] *See also Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1198-1200 (N.J. 2000) (refusing to apply fraud-on-the-market theory to allow a presumption of reliance under New Jersey law, but providing a detailed discussion of the efficient-capital-market hypothesis, which presumes that a stock price incorporates all publicly available information about a stock's value).

certain product if he or she had known more, or more accurate, information at the time of purchase.[8] Unlike purchasers of securities, who can be presumed to have purchased a stock based on its market value, and to have relied on any material misrepresentation serving to artificially inflate the

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[8] *See, e.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 224 (2d Cir. 2008) ("we cannot assume that, regardless of whether individual smokers were aware of defendants' misrepresentation, the market at large internalized the misrepresentation to such an extent that all plaintiffs can be said to have relied on it"), *overruled in part on other grounds, Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008); *Gunnells v. HealthPlan Servs., Inc.*, 348 F.3d 417, 434-37 (4th Cir. 2003) (rejecting "fraud on the market" presumption of reliance in consumer fraud class action); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1363 (11th Cir. 2002) ("The securities market presents a wholly different context than a consumer fraud case"), *overruled in part on other grounds, Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008); *Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000) (affirming denial of certification in consumer fraud class action due to individualized reliance inquiries); *Gartin*, 245 F.R.D. at 438 ("unlike such securities fraud class actions, reliance is not presumed for common-law fraud claims"); *Heindel v. Pfizer Inc.*, 381 F. Supp. 2d 364, 380 (D.N.J. 2004) ("the fraud on the market theory is flawed with respect to Plaintiff's consumer fraud claims"); *Coleman v. Danek Med., Inc.*, 43 F. Supp. 2d 629, 635 n.4 (S.D. Miss. 1998) (noting that "no court has ever adopted a 'fraud on the market' type theory outside the securities fraud context," citing authorities); *Strain v. Nutri/System, Inc.*, 1990 U.S. Dist. LEXIS 17031, at *21-22 (E.D. Pa. Dec. 12, 1990) (denying certification in consumer fraud class action when plaintiff's theory "requires each class member to narrate a story which includes individualized proof of which advertisements he saw and whether they indeed enrolled in reliance of those advertisements. There are no short-cuts")( footnote omitted).

price of that stock, myriad considerations in addition to price may affect an individual purchaser's decision to buy a particular consumer good. Advertisements about such goods, in turn, convey different messages to different people, thus necessitating individual inquiries as to whether the consumer relied upon the advertisement in deciding to make the purchase. *See supra* pages 13 note 8 (collecting cases).

Indeed, the Ninth Circuit (on whose decisions Thorogood heavily relies in an effort to establish a conflict) has rejected application of any presumption of reliance when numerous factors unrelated to the alleged misrepresentations could have motivated the individual class members' decisions to utilize the product. *See Poulos v. Caesar's World, Inc.*, 379 F.3d 654, 668 (9th Cir. 2004) (finding no "single logical explanation" for an individual's decision to use defendants' slot machines; "it may be an addiction, a form of escape, a casual endeavor, a hobby, a risk-taking money venture, or scores of other things").[9]

Far from establishing the existence of any conflict, the Second, Fifth and Eleventh Circuit cases that petitioner criticizes apply the same principles that repeatedly have led courts to reject application of any presumption of reliance in consumer fraud cases. *See, e.g., McLaughlin*, 522 F.3d at 225 (rejecting presumption of reliance on the claimed misrepresentations about the relative safety of light

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[9] The Ninth Circuit also has refused to presume reliance in other contexts in which no efficient market existed. *See Binder v. Gillespie*, 184 F.3d 1059, 1063-65 (9th Cir. 1999).

cigarettes because "each plaintiff in this case could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste and a feeling that smoking Lights was 'cool'"); *Sikes*, 281 F.3d at 1364 ("[E]ach individual plaintiff is the only person with information about the content of the advertisement upon which he relied."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (fraud class action could not be certified because proof of individual class members' reliance on the alleged misstatements was required).

The Seventh Circuit was guided by these same considerations in concluding that there was no basis to presume that every putative class member relied on Sears' "stainless steel" advertisements, which Thorogood himself admitted he did not see (SA 164-65), in determining to purchase a Kenmore dryer. *See* Pet.App. 25a-26a ("Advertisements for clothes dryers advertise a host of features that might matter to consumers, such as price, size, electrical usage, appearance, speed, and controls, but not, as far as anyone in this litigation has suggested except the plaintiff, avoidance of clothing stains due to rust").[10] This correct decision poses no conflict on any

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[10] Petitioner selectively quotes one sentence from the Rules Advisory Notes to Rule 23 (Pet. 27 n.6), while omitting the very next sentence, which states: "On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made *or in the kinds or degrees of reliance by the persons to whom they were addressed*." (Emphasis added.) As the Seventh Circuit correctly recognized, the instant case exemplifies just such issues of varying reliance.

question of federal law and presents no issue warranting this Court's review.

### B. The Purported "Uniformity" of the Claimed Misrepresentations Does Not Support Any Presumption of Reliance.

There is equally no merit to petitioner's contention (Pet. 29, 31) that the presumption of reliance is appropriate based on the supposed "uniformity" of Sears' alleged misrepresentations. Petitioner vastly overstates the holding of *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718 (9th Cir. 2007) in claiming that the Ninth Circuit applied "[a] presumption of reliance 'based upon uniform disclosures.'" Pet. 29. *Lozano* considered whether defendant's alleged illegal billing practices with respect to free "anytime" call minutes it had promised to provide its cell phone customers violated California law (504 F.3d at 722), and, in fact, is entirely consistent with the numerous federal cases discussed above that refused to certify class actions alleging state law consumer fraud claims. Indeed, the petition neglects to apprise this Court that *Lozano* affirmed *denial* of certification of the class claims alleging fraudulent or misleading misrepresentations because an individualized

showing of "each class member's awareness and knowledge" was required. *Id.* at 735.[11] The only

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[11] Consistent with the result in *Lozano*, numerous other federal courts in the Ninth Circuit and elsewhere have rejected assertions that class certification is appropriate when the alleged fraudulent statements at issue were "uniform" or standardized. *See, e.g., McLaughlin*, 522 F.3d at 223 ("proof of misrepresentation—even widespread and uniform misrepresentation—only satisfies half of the equation; the other half, reliance on the misrepresentation, cannot be the subject of general proof"); *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 659 (D. Nev. 2009) ("even if the 'Made it the USA' label was identical on all Ol' Roy packaging, the Court cannot conclude that without the geographic representation, the class members would not have purchased the product. . . . [A]ny number of differences exist between Ol' Roy products and other brands that could have caused class members to purchase Ol' Roy products. Because the reasons consumers purchased Ol' Roy over other brands likely vary greatly, the Court will not presume reliance"); *Pettrey v. Enter. Title Agency, Inc.*, 241 F.R.D. 268, 272, 279-80 (N.D. Ohio 2006) (denying certification despite standardized forms and rejecting argument that, because class members paid for services, they necessarily must have relied on misstatements); *Lichoff v. CSX Transp., Inc.*, 2004 U.S. Dist. LEXIS 21893, at *5, **16-18 (N.D. Ohio Oct. 6, 2004) (denying certification when alleged recruiting misrepresentations were uniform because plaintiffs' "decision to choose a certain career path is inherently a personal one, based on numerous factors, as is the decision to enroll in a certain school"); *Gartin*, 245 F.R.D. at 437-38 & n.6 (rejecting presumption of reliance notwithstanding uniformity of alleged misstatements in advertisements for dog food); *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207, 210, 215 (N.D. Cal. 1994) (denying certification despite alleged misstatements in uniform advertising campaign for hearing aids because customers may have had different motivations for purchasing hearing aids); *Rosenstein v. CPC Int'l, Inc.*, 1991 WL 1783, at *4 (E.D. Pa. Jan. 8, 1991) (denying certification in consumer class action because of individual reliance issues even though "the advertisements

certified claim that was upheld by the Ninth Circuit pertained to the alleged unfairness of the representation. *Id.* at 736-37. In affirming certification of a class with respect to that single claim, the court did not even mention reliance, let alone hold that reliance could be presumed. [12]

Petitioner's suggestion that uniform misrepresentations could support a presumption of reliance in this case also cannot be squared with the undisputed fact that his fraud claims do not depend upon any alleged express misstatements by Sears. Thorogood admitted that he had no evidence that Sears expressly represented that the drums in the dryers at issue were 100% stainless steel. SA 222. Of equal importance, it also was undisputed that Sears did not expressly advertise that its stainless steel drum would prevent rust stains on clothes. Pet. 25a. Rather than relying on Sears' actual statements, Thorogood predicated his charges of fraud on the claimed inferences that "stainless steel" means "100% stainless steel," and that "100% stainless steel" means that the dryers "will never

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were uniform in their nature and broadly disseminated to the public"); *Soper v. Valone*, 110 F.R.D. 8, 9-10 (W.D.N.Y. 1985) (no predominance of common issues even though similar oral presentations were used to induce investment; court noted, *inter alia*, different levels of investor sophistication led to variations of reliance on statements).

[12] Even as to this claim, moreover, the Ninth Circuit affirmed class certification with reservations. *See id.* at 737 ("Though we might have decided the issue differently, our review is limited to assuring that the district court's determination has a basis in reason").

cause rust damage to clothes." As the court of appeals correctly recognized, the inferences Thorogood sought to draw from Sears' actual statements reconfirmed that individual hearings would be required to determine whether other class members "shared his understanding of Sears' representations." Pet. 26a. Indeed, any assessment of the merits of such inferences necessarily requires an individualized inquiry.

## III. ADDITIONAL INFIRMITIES RENDER CLASS CERTIFICATION IN THIS CASE INAPPROPRIATE AND WEIGH HEAVILY AGAINST CERTIORARI

A further reason why this case is an altogether unsuitable candidate for certiorari is that class certification was unwarranted on a host of additional grounds. Given the multiple grounds ultimately requiring denial of class action status, there is no valid basis for this Court to address piecemeal, on an interlocutory appeal, the single basis for denial of class certification addressed in the petition.

As the record in this case makes clear class certification also was inappropriate because of numerous variations among the consumer fraud laws of the 29 jurisdictions invoked by petitioner, and other considerations precluding class treatment of the claims he asserted. *Cf. In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (instructing jury is "impossible" when "more than a few of the laws of

the fifty states differ").[13] Among numerous other differences, the laws of these 29 jurisdictions vary with respect to the requirements for proving reliance. Consistent with the general rule, several state courts that have considered the issue have ruled that reliance cannot appropriately be presumed in consumer fraud cases,[14] and federal

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[13] *See also In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) (reversing class certification because state consumer fraud laws "vary considerably"); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (same point); *Castano*, 84 F.3d at 742-43 n.15 (rejecting class certification based, *inter alia*, on differences among the consumer fraud laws of the various states).

[14] *See, e.g., Hazelhurst v. Brita Prods. Co.*, 295 A.D.2d. 240, 242 (N.Y. App. 2002) ("reliance may not be presumed where, as here, a host of individual factors could have influenced a class member's decision to purchase the product"); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 156-58 (Pa. Super. 2002) (holding that reliance could be presumed only where there was a fiduciary relationship between the parties); *Peltier Enterprises v. Hilton*, 51 S.W.3d 616 (Tex. App. 2000) (denying class certification of a fraud class action because, *inter alia*, of the "individualized proof" required to show "each individual plaintiff's reliance on that misrepresentation or concealment to his or her detriment"); *Millett v. Atl. Richfield*, 2000 WL 359979, at *12 (Me. Super. Mar. 2, 2000) (denying class certification of fraud claims on grounds, *inter alia*, of the need to prove reliance); *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 234 (Md. 2000) (citing reliance requirement for proving fraud claims as reason to deny class certification, and noting: "Respondents, understandably, have cited no Maryland authority for their proposition that proof of reliance is excused"); *Humana, Inc. v. Castillo*, 728 So.2d 261, 265 (Fla. App. 1999) ("Florida law imposes a reliance requirement in an omissions case, which cannot be satisfied by assumptions . . . Florida law also requires a party asserting fraud to establish that but for the

courts applying the law of other of these 29 jurisdictions also have rejected arguments for a presumption of reliance in such cases.[15] State courts in yet more of these jurisdictions have concluded that reliance cannot properly be presumed when, as here, an assessment of each individual's understanding of the advertisements being challenged would be required,[16] while still others require a showing of a

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alleged misrepresentation or nondisclosure, the party would not have entered the transaction"); *Zarella v. Minnesota Mutual Life Ins. Co.*, 1999 WL 226223, at *8 (R.I. Super. Apr. 14, 1999) (agreeing "that class certification is generally not appropriate when individual reliance is at issue" in consumer fraud case, and finding "that individual issues of reliance undermine predominance"), *aff'd in relevant part, reversed in part on other grounds*, 824 A.2d 1249 (R.I. 2003); *see also In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221-22 (E.D. La. 1998) (noting that "the vast majority of states have never adopted a rule allowing reliance to be presumed in common law fraud cases, and some states have expressly rejected such a proposition").

15 *See, e.g., Blades v. Countrywide Home Loans, Inc.*, 2009 WL 903589, at *4 (S.D. Miss. Mar. 27, 2009) (because reasonable reliance was an element of fraud under Mississippi law, class could not meet predominance requirement); *Hum v. Dericks*, 162 F.R.D. 628, 630-40 (D. Haw. 1995) (finding that a product liability/fraud action concerning medical implants was not analogous to a securities action where reliance could be presumed; that class certification was less favored in the products liability context and that differing misrepresentations made class certification inappropriate); *Polich v. Burlington N., Inc.*, 116 F.R.D. 258, 261-62 (D. Mont. 1987) (refusing to certify class because individual issues would predominate, as each class member would have to separately prove elements of fraud despite common misrepresentations).

material inducement or misrepresentation,[17] or that the claimant's reliance was "justifiable."[18]

The 29 jurisdictions invoked by petitioner also differ with respect to what showing must be made regarding the intent of the party making the alleged misrepresentation. For example, some states (but not all) require a showing of intent as a prerequisite to recovery. *See* Tenn. Code Ann. §47-18-104(b)(9); Alaska Stat. §45.50.471(b)(8); N.H. Rev. Stat. Ann. §358-A:2(IX). In addition, some states (but not all) have provisions exempting retailers who disseminate in good faith information obtained from the manufacturer without actual knowledge of supposed misstatements. *See* Tenn. Code Ann. §47-18-111(a)(4); Fla. Stat. Ann. §501.207(1)(c).

These 29 jurisdictions also have varying statutes of limitations for fraud claims, which necessitate individualized inquiries unsuitable for class adjudication. *See, e.g., Fisher v. Bristol-Myers Squib Co.*, 181 F.R.D. 365, 372 (N.D. Ill. 1998) (denying certification in consumer fraud class action

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[16] *See, e.g., Agrella v. Ford Motor Co.*, 2006 WL 1493823, at *6 (Conn. Super. May 18, 2006 ) (denying class certification of fraud claims because proof of causation, *i.e.* that the deceptive advertisements actually caused each consumer in class to purchase vehicle, was required, and involved an individualized inquiry).

[17] *See, e.g., K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 732 N.W.2d 792, 802 (Wisc. 2007).

[18] *See, e.g., Toy v. Metro. Life Ins. Co.*, 863 A.2d 1, 11 (Pa. Super. 2004).

because of, *inter alia*, differing statutes of limitation among states); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 571 (E.D. Tex. 1974) (same).[19] Louisiana and Texas each bar claims not initiated within one year of the alleged injury. *See* La. Rev. Stat. Ann. §51:1409(E); Tenn. Code Ann. §47-18-110. Alaska, Kentucky, and Ohio bar any claims that are not filed within two years. Alaska Stat. §45.50.531(f); Ky. Rev. Stat. Ann. §367.170(1); Ohio Rev. Code Ann. §1345.10(C). New York bars claims filed more than three years from the accrual of the claim. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 750 N.E.2d 1078, 1082 (N.Y. 2001). Massachusetts and Nebraska both have a four-year statute of limitations. *See* Mass. Gen. Laws. Ch. 260, §5A; Neb. Rev. Stat. §59-1612.

Petitioner also has failed to assert any injury that could be adjudicated on a classwide basis. Among other things, Thorogood did not even allege that every purchaser of Kenmore dryers sustained rust stains to their clothes as he allegedly did. *Cf. Sanchez v. Wal Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48428, at **5-7 (E.D. Cal. May 28, 2009) (denying certification in consumer fraud class for similar reasons); *see also* Pridgen, CONSUMER PROTECTION AND THE LAW §5:9 (Westlaw 2009) ("When a class action is being litigated, the problems of proving injury to all the class members may be even more problematic"). There is no merit to

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[19] Contrary to the district court's ruling (Pet.App. 5a-6a), statutes of limitation are considered "substantive." *See Jinks v. Richland Co.*, 538 U.S. 456, 465 (2003).

Thorogood's attempt to circumvent this defect by alleging a paid "premium" theory, *i.e.*, that purchasers of "stainless steel" dryers did not receive the full value of the purchase. Courts have rejected identical attempts to establish a common injury suitable for class determination. *See Sanchez*, 2009 U.S. Dist. LEXIS 48428, at **6-7; *accord McLaughlin*, 522 F.3d at 226 n.7 (noting that consumer transactions implicate a "degree of personal idiosyncratic choice"). More fundamentally, several of the 29 jurisdictions whose law Thorogood invoked (including his home state Tennessee) refuse to allow recovery even on an individual basis under a "premium" theory. *See, e.g., Rollins, Inc. v. Butland*, 951 So.2d 860, 873 (Fla. App. 2007); *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001); *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 766 (Tenn. App. 2002).[20]

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[20] In addition, serious issues exist regarding petitioner's standing to assert consumer fraud claims on behalf of class members residing in certain states. Several of the relevant states extend their consumer protections only to residents or individuals injured while in the state. *See, e.g., Shaw v. Marriott Intern., Inc.*, 570 F. Supp.2d 78, 86-87 (D. D.C. 2008) (District of Columbia law); *Thomas v. Metropolitan Life Ins. Co.*, 540 F. Supp.2d 1212, 1225-27 (W.D. Okla. 2008) (New York law); *Baker v. Family Credit Counseling Corp.*, 440 F. Supp.2d 392, 413-14 (E.D. Pa. 2006) (Pennsylvania law); *Nepomoceno v. Knights of Columbus*, 1999 U.S. Dist. LEXIS 1366 at *43 (N.D. Ill. Feb. 1999) (Connecticut law); *Bass v. Hendrix*, 931 F. Supp. 523, 536 (S.D. Tex. 1996) (Texas law). Because Thorogood is a resident of Tennessee, and does not allege that he suffered any injury in these other states, he lacks standing to assert consumer fraud claims on behalf of residents of states that limit their consumer protection laws to their own residents. *See, e.g., Fairley v. Patterson*, 493 F.2d 598, 604 (5th Cir. 1974)

Given the numerous considerations confirming that class certification could not properly be granted in this case, there is no basis for this Court to review the Seventh Circuit's decision.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 17, 2009

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(nonresident plaintiffs lacked standing to serve as class representatives); *In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp.2d 1365, 1370-72 & n.5 (S.D. Fla. 2001) (same).

(3)

No. 08-1412

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

STEVEN J. THOROGOOD, on behalf of himself and all others similarly situated,

*Petitioner,*

*v.*

SEARS, ROEBUCK AND CO.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## REPLY BRIEF

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## QUESTION PRESENTED

Respondent's Question Presented ignores unrebutted evidence that Respondent uniformly misrepresented and omitted a material characteristic of the laundry dryers in question: that the purportedly "stainless steel" dryer drums were only partially stainless steel. However, the Seventh Circuit Court of Appeals, aligning itself with the Second, Fourth, Fifth, and Eleventh Circuits, held that this common class-wide material misrepresentation cannot satisfy Federal Rule 23(a)(3)'s "predominance" requirement, instead adopting an impossible standard that requires examination of the class members' underlying motivations behind their reliance for their purchases, rather than the objective material misrepresentation standard (examining only the fact of reliance) adopted by the First, Third, Eighth, Ninth and Tenth Circuit Courts of Appeals.

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## REPLY IN SUPPORT OF GRANTING THE PETITION

Petitioner Steven J. Thorogood ("Petitioner" or "Plaintiff") respectfully submits this reply in support of his petition for a writ of certiorari.

Respondent Sears, Roebuck and Co.'s ("Respondent" or "Sears") Brief in Opposition misstates the facts and law. The issue here is whether a uniform misrepresentation of a product's composition (a laundry dryer's "stainless steel" drum), which is a feature that commands a substantial price premium and is material to a customer's purchase decision, can support common proof of class-wide reliance for class certification under Federal Rule of Civil Procedure 23(b)(3).

## PETITIONER'S REPLY IN SUPPORT OF GRANTING THE PETITION

Respondent Sears' denial of having made any representations that the Kenmore laundry dryer drums were "100% stainless steel" (Br. in Opp. 2-3, 18) ignores that Sears explicitly advertised the Kenmore laundry dryers as three grades: "Good" (featuring a drum Sears represented as enamel-coated mild steel), "Better" (featuring a "Stainless Steel Drum Back with white power-coated drum"), and "Best" (featuring a "Stainless Steel Drum and Drum Back");[1] which Sears priced accordingly.

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[1] During discovery, Sears refused to produce any point-of-sale representations Sears made at Sears' stores. However, the Kenmore Buying Guide advertisement attached as "Exhibit A" (Cont'd)

Sears' Opposition Brief also ignores that the class had been certified by the District Court based on Sears' objective, uniform and material misrepresentations, but subsequently decertified in the Seventh Circuit's view that Plaintiff must prove each class member's subjective *motivations* for valuing the misrepresented attribute, instead of proving class-wide causation objectively through common proof (here, the common proof that (1) each class member paid a premium for the feature of a "stainless steel" drum, over lesser-priced dryers Sears advertised as containing mild steel drums or only partially stainless steel drums (Pet. 6-7), and (2) a dryer drum composed entirely of stainless steel dramatically increased the "delivery of superior fabric care" over drums containing mild steel parts, which is the "primary factor" in a consumer's decision to purchase a certain laundry dryer (Pet. 10-11)).

In doing so, the Seventh Circuit imposed an impossible subjective test, requiring Plaintiff to prove each class member's subjective motivations, rather than their objective reliance; rejecting the view of the majority of federal circuits, and "forbidding district courts from relying on plaintiffs' allegations of

(Cont'd)

to Plaintiff's motion for class certification in the District Court shows Sears explicitly ranking the models as "Good" (listing models with a powder-coated mild steel drum), "Better" (explicitly representing these models as having the "Step Up Feature" of a "stainless steel drum back with white powder-coated drum"), and "Best" (listing the "Step Up Feature" of a "stainless steel drum and drum back"), of which the "Best" (i.e., fully stainless steel drum) models are the subject of this class action. (Pet. 10.)

sufficiently common proof and requiring the courts to make specific findings that each Rule 23 criterion is met." *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6, 24 (1st Cir. 2008) (noting the "substantial differences" between the Second, Fourth, Fifth and Seventh Circuits' heightened degree of individual proof required for Rule 23 class certification and the Third and Eighth Circuits' holdings that common proof can support a class-wide rebuttable presumption).

Respondent's opposition misstates the record and ignores the split among the circuits over whether the requisites of Rule 23 can be shown "objectively" through common proof or must be shown individually for each class member.

## I. Respondent Significantly Misstates the Factual Record Regarding Plaintiff's Common Proof of Reliance for the Class.

Sears' opposition brief outrageously misstates the Record in claiming that "Thorogood certainly did not show that Sears made any uniform statements in advertisements . . . that its dryers were '100%' or 'fully'" stainless steel, or "would always be rust free." (Br. in Opp. 4. )

First, it is undisputed that in *every* advertisement explaining the Kenmore laundry dryers in question, Sears described the relevant models' drums only as "stainless steel" as distinct from lesser grade dryers described as having only *partially* stainless steel drums (Pet. 10), omitting the fact that the "stainless steel" dryer

drums contained a mild steel "drum front."[2] Nor did Sears rebut the materiality of Sears misrepresentation. Indeed, Sears' own head laundry buyer Dan Pigatto declared that a *fully* stainless steel drum provides "superior fabric care" for a variety of reasons, and superior fabric care is the "primary" consideration for laundry dryer purchasers. Pet. 23. Moreover, the materiality of Sears' omission is shown by the fact that all purchasers paid a premium for dryers with a purportedly "stainless steel drum," due to its perceived superiority and higher production costs and raw material costs of stainless steel, and which Sears included only on its "Best" premium priced laundry dryers. (Pet. 10.)[3]

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[2] While Sears describes the rustable mild steel portion of the dryer drums as merely a "front flange," there is no dispute that the part is actually called the "drum front," according to the laundry dryers' manufacturer, Electrolux Home Products, Inc. *See* Pet. 6-7.

[3] While the premium class members paid for the Kenmore laundry dryers shows the materiality and, ultimately, class members' reliance on Sears' misrepresentation, the fact that class members paid a premium for a product with a diminished value is *not* Plaintiff's "theory" of Sears' liability, as Sears misleadingly claims at page 24 of its Brief in Opposition. Nor is Plaintiff's theory that all class members suffered rust damage to their dryers. (Br. in Opp. 23.) Instead, Plaintiff's theory of Sears' liability is that it deceptively induced consumers into purchasing the laundry dryers in question through an omission of a material characteristic of that laundry dryer which, if proven, would satisfy the consumer protection statutes of every jurisdiction included in the class. (Pet. 20) (noting that Plaintiff limited the class to only those states' whose consumer protection statutes applied the same substantive legal standards as Tennessee's Consumer Protection Act).

Second, Sears' repeated assertion that it never represented the drums as "fully" or "100%" stainless steel (Br. in Opp. 4) is outright false because Sears explicitly represented the "stainless steel" drums as a "Step Up Feature" over Kenmore laundry dryers advertised with *partially* stainless steel drums. It is undisputed that during the time Thorogood purchased his Kenmore dryer, Sears offered Kenmore dryers with three types of drums: (1) "Good" dryers, containing drums described only as enamel-coated mild (i.e., corrodible) steel, (2) "Better" dryers, with drums described as containing both mild steel and stainless steel ("stainless steel drum back with white powder-coated drum"), and (3) the "Best" dryers, containing drums described only as "stainless steel." Pet. 10. Sears' "Stainless Steel drum" description of the Kenmore laundry dryer drums in question clearly conveyed the representation as "fully" or "100%" stainless steel.

Therefore, Plaintiff *did* show that Sears uniformly represented the Kenmore dryers as having a "stainless steel drum," and that this uniform representation omitted the fact that the drums contained mild steel "drum fronts" that were susceptible to rust. Plaintiff showed this omitted fact to be material because (1) purchasers paid a premium for this feature, over drums described as only partially stainless steel, and (2) Sears' head laundry buyer provided unrebutted testimony that *fully* stainless steel drums materially affect a consumer's decision to purchase a laundry dryer.

## II. Because Plaintiff Provided Common Proof that All Class Members Relied Upon Sears' Uniform and Material Misrepresentation, the Seventh Circuit's Decertification on the Basis that Plaintiff Must Prove the Particular Motivation for Each Class Member's Reliance Establishes an Impossible Standard that Effectively Nullifies Rule 23 in the Consumer Fraud Context.

Sears' Brief in Opposition significantly misstates the conflict among the federal circuits regarding whether Rule 23's requisites can be shown by common proof. The conflict is not that certain circuits "presume reliance in consumer fraud cases." (Br. in Opp. 10.) Rather, the issue is whether a rebuttable presumption that all class members relied on a misstatement is created when a plaintiff presents proof common to all class members (here, that all purchasers of the Kenmore laundry dryers paid a premium for a uniformly misleading product).

As the First Circuit Court of Appeals explained in *In re New Motor Vehicles*, the fraud-on-the-market presumption of reliance is just one example of reliance being shown class-wide "through common proof." 522 F.3d at 25 (siding with the Third and Eighth Circuits' allowance of common proof to show Rule 23 predominance when plaintiff's theory of liability is "viable").

Sears next argument, that the availability of the fraud-on-the-market theory in federal securities fraud claims "have no relevance here because they are governed by unique rules having no application to the state law consumer fraud claims," (Br. in Opp. 11), misstates the point. Petitioner does not seek to extend the fraud-on-the-market theory to the consumer fraud context. Rather, Petitioner's argument is that Rule 23(b)(3)'s predominance requirement **can** be proven by common proof, *similar to* the fraud-on-the-market theory. (Pet. 28-30.) As *In re New Motor Vehicles* goes on to explain, a plaintiff should be able to objectively show that predominance is met class-wide as long as plaintiff can put forth viable common proof that logically creates a presumption that all class members relied upon the misrepresentation:

> Plaintiffs cannot make their case without common proof of causation, and they can only prove causation through common means if their novel theory is viable; that viability in turn depends on their ability to establish–whether through mathematical models or further data or other means–the key logical steps behind their theory.

522 F.3d at 26-27. The Seventh Circuit's reversal squarely rejects this common proof method of satisfying Rule 23, imposing an impossible standard, requiring Plaintiff to show each class members' underlying subjective motivation for purchasing the laundry dryers:

> The evaluation of the class members' claims will require individual hearings. Each

> class member who wants to pursue relief against Sears will have to testify to what he understands to be the meaning of a label or advertisement that identifies a clothes dryer as containing a stainless steel drum. Does he think it means that the drum is 100 percent stainless steel because otherwise his clothes might have rust stains, or does he choose such a dryer because he likes stainless steel for reasons unrelated to rust stains and is indifferent to whether a part of the drum not easily seen is made of a different material?

(Pet. App. 25a-26a.)

Therefore, the Seventh Circuit's ruling aligns with the Second, Fourth, Fifth and Eleventh Circuits that, according to *In re New Motor Vehicles*, "forbid[ ] district courts from relying on plaintiffs' allegations of sufficiently common proof and requiring the courts to make specific findings that each Rule 23 criterion is met." 522 F.3d at 24 (internal citations omitted). This essentially eliminates the viability of Rule 23 in the consumer fraud context, and should be reviewed by the Court, and reversed in favor of the standard by the First, Third, Eighth, Ninth and Tenth Circuits' objective reliance standard.[4]

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[4] As shown in Plaintiff's Petition at pages 26-31, in addition to the circuit conflict set forth in *In re Motor Vehicles*, the Ninth and Tenth Circuits also permit a rebuttable presumption of (Cont'd)

## CONCLUSION

The Seventh Circuit's ruling in *Thorogood v. Sears*, that Rule 23's requisites cannot be shown objectively through common proof, profoundly threatens the viability of any consumer fraud class actions brought under Rule 23 and squarely presents a vehicle to resolve the conflict between (a) the Second, Fourth, Fifth, Seventh and Eleventh Circuits' demand for uniformity of motivation, and (b) the First, Third, Eighth, Ninth and Tenth Circuits' requirement of only uniformity of marketing and reliance. Therefore, the Court should grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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(Cont'd)
reliance where plaintiff offers a viable theory of common proof for each class member, while the Eleventh Circuit also takes the Seventh Circuit's position that common proof cannot satisfy the requisites of Rule 23.